### 1AC Plan

#### The United States federal judiciary should order that individuals who have won their habeas corpus hearing while in military detention should be released.

### 1AC Legal Legitimacy

**Contention one is Legal Legitimacy:**

**Lack of a credible remedy renders habeas useless**

**Milko 12** [Winter, 2012, Jennifer L. Milko, “Separation of Powers and Guantanamo Detainees: Defining the Proper Roles of the Executive and Judiciary in Habeas Cases and the Need for Supreme Guidance”, 50 Duq. L. Rev. 173]

A. Arguments for a Remedy **By urging deference to the Executive Branch**, **the D.C. Circuit Court** of Appeals **has scolded the district courts that have second-guessed the political branches' determinations about release** and suitable transfers. **Those in favor of judicial power** have **argued** **that the denial of the right to review** the Executive's decisions **is allowing too much deference to that branch and** severely **limiting the remedies that courts have had the power to issue in the past.** Though the petitioners have made several arguments for relief, **the main arguments for judicial power stem from the idea that the court of appeals has been improperly applying** Supreme Court **precedent**. Petitioners have argued that **the D.C. Court of Appeals expanded the scope of Munaf too broadly** as the Supreme Court noted that the decision was limited to the facts of that case. n118 In Munaf, **the Court was primarily concerned about allowing the Iraqi government to have the power to punish people** who had committed crimes in that territory when fashioning its holding, and the petitioners in that case had the opportunity of notice because they were told about their transfer and were able to petition the court to try and prevent it. n119 Petitioners have argued that **those facts are entirely different than cases such as Mohammed and Khadr were there was concern of torture in foreign nations but no need to allow those nations to have the ability to prosecute the detainees for crimes**, **there was potential for torture at the hands of non-government entities**, **and no notice of transfer was permitted**. n120 [\*190] Additionally, Petitioners have argued that **the use of Munaf has impermissibly limited Boumediene by preventing courts from fashioning equitable relief for habeas petitions**. n121 **There has been concern that the ability to use the writ of habeas will be essentially eliminated if there is no chance for a petitioner to challenge the** Executive Branch's **determinations regarding safe transfers**. The Boumediene Court spent considerable time discussing the history of the writ n122 and noted that the tribunals implemented in that case to determine enemy combatant status were not a sufficient replacement for the writ of habeas because they lacked, in part, the authority to issue an order of release. n123 Here, **the D.C. Circuit Court of Appeals has effectively prevented the other courts from determining if there is a right not to be transferred**, **which has been argued to be an inadequate statement of the right of habeas**. n124 Similarly, it has been argued that **by accepting the Executive Branch's assurances of its efforts to release the detainees**, **the courts are not properly using the power of habeas corpus that has been granted to them** by the Constitution. n125 By refusing to question these assertions, **the courts would be unable to offer a remedy to the petitioners who have the privilege of habeas corpus**. n126 The Petitioners also argued a due process right to challenge transfers as the detainees have a right to a meaningful hearing to at least have the opportunity to challenge the Government's conclusions regarding safety. n127 **By refusing to second-guess the Executive, the judiciary may be losing an important check on the former's power because there is no guarantee that the Executive is ensuring safety or making the best effort to protect the unlawfully kept detainees.** **Without allowing courts to have the power to enjoin a transfer in order to examine these concerns**, **there is the potential that the detainee could be harmed at the hands of foreign terrorists.** **Without the ability to challenge the Executive Branch through the judicial tool of habeas corpus, there has been genuine concern that the courts are losing too much power and that their authority** [\*191] **is being improperly limited, as they are not utilizing their constitutional power properly.**

**Only the plan’s judicial clarification solves and maintains legitimacy**

**Knowles 9** [Spring, 2009, Robert Knowles is a Acting Assistant Professor, New York University School of Law, “American Hegemony and the Foreign Affairs Constitution”, ARIZONA STATE LAW JOURNAL, 41 Ariz. St. L.J. 87]

The Bush Administration's detainee policy made clear that - due to America's power - the content of enforceable international law applicable to the detainees would largely depend on interpretation by the U.S. government. Under the classic realist paradigm, international law is less susceptible to judicial comprehension because it cannot be taken at face value; its actual, enforceable meaning depends on ever-shifting political dynamics and complex relationships among great powers. But **in a hegemonic system, while enforceable international legal norms may still be political, their content is heavily influenced by the politics of one nation** - the United States. n412 **As an institution of that same government, the courts are well-positioned to understand and interpret international law that has been incorporated into U.S. law.** Because the courts have the capacity to track international legal norms, **there was no longer a justification for exceptional deference to the Administration's interpretation of the Geneva Conventions as applied to the detainees.** Professors Posner and Sunstein have argued for exceptional deference on the ground that, unless the executive is the voice of the nation in foreign affairs, other nations will not know whom to hold accountable for foreign policy decisions. n413 But the Guantanamo litigation demonstrated that American hegemony has altered this classic assumption as well. **The** [\*154] **transparent and accessible nature of the U.S. government made it possible for other nations to be informed about the detainee policy and, conceivably, to have a role in changing it.** The Kuwaiti government hired American attorneys to represent their citizens held at Guantanamo. n414 **In the enemy combatant litigation, the government was forced to better articulate its detainee policies, justify the detention of each detainee, and permit attorney visits with the detainees**. n415 Other nations learned about the treatment of their citizens through the information obtained by attorneys. n416 Although the political climate in the U.S. did not enable other nations to have an effect on detainee policy directly - and Congress, in fact, acted twice to limit detainees' access to the courts n417 - this was an exceptional situation. Foreign governments routinely lobby Congress for favorable foreign affairs legislation, and are more successful with less politically-charged issues. n418 Even "rogue states" such as Myanmar have their lobbyists in Washington. n419 In addition, **foreign governments facing unfavorable court decisions can and do appeal or seek reversal through political channels.** n420 **The accessibility and openness of the U.S. government is not a scandal or weakness; instead, it strengthens American hegemony by giving other nations a voice in policy, drawing them into deeper relationships that serve America's strategic interests.** n421 In the Guantanamo litigation, **the courts served as an important accountability mechanism when the political branches were relatively unaccountable to the interests of other nations. The hegemonic model** also **reduces the need for executive branch flexibility, and the institutional competence terrain shifts toward the courts**. **The stability of the current U.S.-led international system depends on the ability of the U.S. to govern effectively. Effective governance depends on**, among other things, **predictability**. n422 G. John **Ikenberry analogizes America's hegemonic position to that of a "giant corporation" seeking foreign investors:** "**The rule of law and the institutions of policy making in a democracy are the political equivalent of corporate transparency and [\*155] accountability**." n423 **Stable interpretation of the law bolsters the stability of the system because other nations will know that they can rely on those interpretations and that there will be at least some degree of enforcement by the United States**. At the same time, **the separation of powers serves the global-governance function by reducing the ability of the executive branch to make "abrupt or aggressive moves toward other states**." n424 **The Bush Administration's detainee policy**, for all of its virtues and faults, **was an exceedingly aggressive departure from existing norms, and was therefore bound to generate intense controversy**. It was formulated quickly, by a small group of policy-makers and legal advisors without consulting Congress and over the objections of even some within the executive branch. n425 **Although the Administration invoked the law of armed conflict to justify its detention of enemy combatants, it did not seem to recognize limits imposed by that law**. n426 Most significantly, it designed the detention scheme around interrogation rather than incapacitation and excluded the detainees from all legal protections of the Geneva Conventions. n427 It declared all detainees at Guantanamo to be "enemy combatants" without establishing a regularized process for making an individual determination for each detainee. n428 And when it established the military commissions, also without consulting Congress, the Administration denied defendants important procedural protections. n429 In an anarchic world characterized by great power conflict, **one could make the argument that the executive branch requires maximum flexibility to defeat the enemy, who may not adhere to international law.** Indeed, **the precedents relied on most heavily by the Administration in the enemy combatant cases date from the 1930s and 1940s - a period when the international system was radically unstable**, and the United States was one of several great powers vying for advantage. n430 But during that time, the executive branch faced much more exogenous pressure from other great powers to comply with international law in the treatment of captured enemies. If the United States strayed too far from established norms, it would risk retaliation upon its own soldiers or other consequences from [\*156] powerful rivals. Today, there are no such constraints: enemies such as al Qaeda are not great powers and are not likely to obey international law anyway. Instead, **the danger is that American rule-breaking will set a pattern of rule-breaking for the world, leading to instability. n431 America's military predominance enables it to set the rules of the game. When the U.S. breaks its own rules, it loses legitimacy.** The Supreme Court's response to the detainee policy enabled the U.S. government as a whole to hew more closely to established procedures and norms, and to regularize the process for departing from them. After Hamdi, n432 the Department of Defense established a process, the CSRTs, for making an individual determination about the enemy combatant status of all detainees at Guantanamo. After the Court recognized habeas jurisdiction at Guantanamo, Congress passed the DTA, n433 establishing direct judicial review of CSRT determinations in lieu of habeas. Similarly, after the Court declared the military commissions unlawful in Hamdan, n434 this forced the Administration to seek congressional approval for commissions that restored some of the rights afforded at courts martial. n435 In Boumediene, the Court rejected the executive branch's foreign policy arguments, and bucked Congress as well, to restore the norm of habeas review. n436 **Throughout this enemy combatant litigation, it has been the courts' relative insulation from politics that has enabled them to take the long view**. In contrast, **the President's** (and Congress's) **responsiveness to political concerns in the wake of 9/11 has encouraged them to depart from established norms for the nation's perceived short-term advantage,** even at the expense of the nation's long-term interests. n437 As Derek Jinks and Neal Katyal have observed, "**treaties are part of [a] system of time-tested standards, and this feature makes the wisdom of their judicial interpretation manifest.**" n438 At the same time, **the enemy combatant cases make allowances for the executive branch's superior speed**. **The care that the Court took to limit the issues it decided in each case gave the executive branch plenty of time to [\*157] arrive at an effective detainee policy.** n439 Hamdi, Rasul, and Boumediene recognized that the availability of habeas would depend on the distance from the battlefield and the length of detention. n440 **The enemy combatant litigation** also **underscores the extent to which the classic realist assumptions about courts' legitimacy in foreign affairs have been turned on their head.** In an anarchic world, legitimacy derives largely from brute force. The courts have no armies at their disposal and look weak when they issue decisions that cannot be enforced. n441 But **in a hegemonic system, where governance depends on voluntary acquiescence, the courts have a greater role to play.** Rather than hobbling the exercise of foreign policy, **the courts are a key form of "soft power."** n442 As Justice Kennedy's majority opinion observed in Boumediene, **courts can bestow external legitimacy on the acts of the political branches**. n443 **Acts having a basis in law are almost universally regarded as more legitimate than merely political acts.** **Most foreign policy experts believe that the Bush Administration's detention scheme "hurt America's image and standing in the world."** n444 The restoration of habeas corpus in Boumediene may help begin to counteract this loss of prestige. Finally, the enemy combatant cases are striking in that they embrace a role for representation-reinforcement in the international realm. n445 **Although defenders of special deference acknowledge that courts' strengths lie in protecting the rights of minorities, it has been very difficult for courts to protect these rights in the face of exigencies asserted by the executive branch** in foreign affairs matters. This is especially difficult when the minorities are alleged enemy aliens being held outside the sovereign territory of the United States in wartime. In the infamous Korematsu decision, another World War II-era case, the Court bowed to the President's factual assessment of the emergency justifying detention of U.S. citizens of Japanese ancestry living in the United States. n446 **In Boumediene, the Court [\*158] pointedly declined to defer to the executive branch's factual assessments of military necessity**. n447 **The court may have recognized that a more aggressive role in protecting the rights of non-citizens was required by American hegemony.** In fact, **the arguments for deference with respect to the rights of non-citizens are even weaker because aliens lack a political constituency in the United States**. n448 **This outward-looking form of representation-reinforcement serves important functions. It strengthens the legitimacy of U.S. hegemony by establishing equality as a benchmark and reinforces the sense that our constitutional values reflect universal human rights.** n449

**Unless the judiciary initiates remedial power the Court will be reduced to irrelevance**

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**In Boumediene, the Court split over whether the petitioners had access**, through the DTA**, to an adequate substitute to the habeas remedy.** But **nine justices agreed about what habeas is: a remedial mechanism by which the Judiciary compels release.** The Court acknowledged the importance of the writ as a “vital instrument for the protection of individual liberty.” Id. at 2246 (collecting cases). **Because release is what the “instrument” achieves, the absence of an express release remedy** in the DTA **troubled the Court**, id. at 2271**, which saw in that absence one of the “constitutional infirmities” of the DTA regime**, id. at 2272. **The Chief Justice differed sharply with the majority— but not on the question of whether habeas requires release**. His opinion (joined by all of the dissenting justices) argued that the MCA’s jurisdictional strip did not violate the Suspension Clause, in part, because the DTA did afford a release remedy. 128 S. Ct. at 2291- 92. The majority concluded that **a “habeas court must have the power to order the conditional22 release of an individual unlawfully detained,**” **Boumediene**, 128 S. Ct. at 2266, while the Chief Justice **wrote similarly that “the writ requires most fundamentally an Article III court be able to hear the prisoner’s claims and**, when necessary, **order release,”** id. at 2283 (emphasis added). Thus **four dissenting justices**, like five in the majority, **agreed that release is fundamental to habeas and that the power to order it is of the essence of judicial power. This conclusion had been well established before**. See, e.g., In re Medley, 134 U.S. 160, 173 (1890) (“under the writ of habeas corpus we cannot do anything else than discharge the prisoner from wrongful confinement”); Ex Parte Watkins, 28 U.S. (3 Pet.) at 202 (Marshall, C.J.); Ex Parte Bollman, 8 U.S. (4 Cranch) 75, 136 (1807) (a habeas court that finds imprisonment unlawful “can only direct [the prisoner] to be discharged”); THE FEDERALIST NO. 84 at 629 (Alexander Hamilton) (John C. Hamilton ed. 1869) (habeas is “a remedy for [the] fatal evil” of “arbitrary imprisonments”).23 The government has never explained how it could be otherwise. **A habeas writ that did not conclusively end unlawful Executive imprisonment would protect neither the separation of powers**, **because it would not judicially check the Executive**; **nor the prisoner, who would obtain nothing from judicial review; nor the Judiciary, whose function would be** (and, since Boumediene, largely has been) **reduced to cheerleading, if not outright irrelevance**. **The** **writ and the constitutional plan require more of the Judiciary than to accept assurances from Executive jailers.** See Harris v. Nelson, 394 U.S. 286, 292 (1969) (no higher duty of a court than “the careful processing and adjudication of petitions for writs of habeas corpus”; **writ must “be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected”**); Bowen v. Johnston, 306 U.S. 19, 26 (1939) (habeas corpus the “precious safeguard of personal liberty”; “no higher duty than to maintain it unimpaired”).

**Otherwise global instability is inevitable – court re-affirmation of habeas stops global war**

**Knowles 9** [Spring, 2009, Robert Knowles is a Acting Assistant Professor, New York University School of Law, “American Hegemony and the Foreign Affairs Constitution”, ARIZONA STATE LAW JOURNAL, 41 Ariz. St. L.J. 87]

**American unipolarity has created a challenge for realists**. **Unipolarity was thought to be inherently unstable** because other nations, seeking to protect their own security, form alliances to counter-balance the leading state. n322 But **no nation or group of nations has yet attempted to challenge America's military predominance**. n323 Although some realists predict that [\*140] counter-balancing will occur or is already in some ways occurring, n324 William Wohlforth has offered a compelling explanation for why true counter-balancing, in the traditional realist sense, will probably not happen for decades. n325 American unipolarity is unprecedented. n326 First, **the United States is geographically isolated from other potential rivals**, who are located near one another in Eurasia. n327 **This mutes the security threat that the U.S. seems to pose while increasing the threats that potential rivals seem to pose to one another**. n328 Second, **the U.S. far exceeds the capabilities of all other states in every aspect of power** - military, economic, technological, and in terms of what is known as "soft power." **This advantage "is larger now than any analogous gap in the history of the modern state system."** n329 Third, **unipolarity is entrenched as the status quo** for the first time since the seventeenth century, **multiplying free rider problems for potential rivals and rendering less relevant all modern previous experience with balancing**. n330 Finally, **the potential rivals' possession of nuclear weapons makes the concentration of power in the United States appear less threatening**. A war between great powers in today's world is very unlikely. n331 **These factors make the current system much more stable, peaceful and durable** than the past multi-polar and bipolar systems in which the United States operated for all of its history until 1991. **The lack of balancing means that the U**nited **S**tates, **and by extension the executive branch, faces** much **weaker external constraints on its exercise of power** than in the past. n332 Therefore, **the internal processes of the U.S. matter now more than any other nations' have in history**. n333 And **it is these internal processes**, as much as external developments, **that will determine the durability of American unipolarity**. As one realist scholar has argued, **the U.S. can best ensure the [\*141] stability of this unipolar order by ensuring that its predominance appears legitimate**. n334 **Hegemonic orders take on hierarchical characteristics**, with the preeminent power having denser political ties with other nations than in a unipolar order. n335 **Stability in hegemonic orders is maintained in part through security guarantees and trade relationships that result in economic specialization** among nations. n336 For example, if Nation X's security is supplied by Hegemon Y, Nation X can de-emphasize military power and focus on economic power. In a hegemonic system, **the preeminent state has "the power to shape the rules of international politics according to its own interests."** n337 **The hegemon**, in return, **provides public goods for the system as a whole**. n338 **The hegemon possesses** not only superior command of military and economic resources but "**soft" power, the ability to guide other states' preferences and interests.** n339 **The durability and stability of hegemonic orders depends on other states' acceptance of the hegemon's role. The hegemon's leadership must be seen as legitimate**. n340 [\*142] **The U**nited **S**tates **qualifies as a global hegemon**. In many ways, **the U.S. acts as a world government**. n341 **It provides public goods for the world**, such as security guarantees, the protection of sea lanes, and support for open markets. n342 After World War II, the U.S. forged a system of military alliances and transnational economic and political institutions - such as the United Nations, NATO, the International Monetary Fund, and the World Bank - that remain in place today. The U.S. provides security for allies such as Japan and Germany by maintaining a strong military presence in Asia and Europe. n343 Because of its overwhelming military might, the U.S. possesses what amounts to a "quasi-monopoly" on the use of force. n344 This prevents other nations from launching wars that would tend to be truly destabilizing. Similarly, **the United States provides a public good through its efforts to combat terrorism** and confront - even through regime change - rogue states. n345 **The U**nited **S**tates also **provides a public good through its** **promulgation and enforcement of international norms. It exercises a dominant influence on the definition of international law because it is the largest "consumer" of such law and the only nation capable of enforcing it on a global scale.** n346 The U.S. was the primary driver behind the establishment of the United Nations system and the development of contemporary treaties and institutional regimes to effectuate those treaties in both public and private international law. n347 Moreover, **controlling international norms are** [\*143] sometimes **embodied in the U.S. Constitution and domestic law rather than in treaties or customary international law.** For example, **whether terrorist threats will be countered effectively depends "in large part on U.S. law regarding armed conflict, from rules that define the circumstances under which the President can use force to those that define the proper treatment of enemy combatants.**" n348 **These public goods provided by the United States stabilize the system by legitimizing it and decreasing resistance to it.** **The transnational** political and economic **institutions created by the U**nited **S**tates **provide other countries with informal access to policymaking and tend to reduce resistance to American hegemony, encouraging others to "bandwagon"** with the U.S. rather than seek to create alternative centers of power. n349 American hegemony also coincided with the rise of globalization - the increasing integration and standardization of markets and cultures - which tends to stabilize the global system and reduce conflict. n350 **The legitimacy of American hegemony is strengthened and sustained by the democratic and accessible nature of the U.S. government**. **The American constitutional separation of powers is an international public good.** **The risk that it will hinder the ability of the U.S. to act swiftly, coherently or decisively** in foreign affairs **is counter-balanced by the benefits it provides in permitting foreigners multiple points of access to the government**. n351 Foreign nations and citizens lobby Congress and executive branch agencies in the State, Treasury, Defense, and Commerce Departments, where foreign policy is made. n352 They use the media to broadcast their point of view in an effort to influence the opinion of decision-makers. n353 Because the United States is a nation of immigrants, many American citizens have a specific interest in the fates of particular countries and form "ethnic lobbies" for the purpose of affecting foreign policy. n354 **The courts,** too, **are accessible to foreign nations and non-citizens. The Alien Tort Statute is emerging as an** [\*144] **important vehicle for adjudicating tort claims among non-citizens in U.S. courts.** n355 Empires are more complex than unipolar or hegemonic systems. **Empires consist of a "rimless-hub-and-spoke structure,**" with an imperial core - the preeminent state - ruling the periphery through intermediaries. n356 The core institutionalizes its control through distinct, asymmetrical bargains (heterogeneous contracting) with each part of the periphery. n357 Ties among peripheries (the spokes) are thin, creating firewalls against the spread of resistance to imperial rule from one part of the empire to the other. n358 **The success of imperial governance depends on the lack of a "rim**." n359 **Stability in imperial orders is maintained through "divide and rule," preventing the formation of countervailing alliances in the periphery** by exploiting differences among potential challengers. n360 Divide-and-rule strategies include using resources from one part of the empire against challengers in another part and multi-vocal communication - legitimating imperial rule by signaling "different identities ... to different audiences." n361 Although the U.S. has often been labeled an empire, the term applies only in limited respects and in certain situations. Many foreign relations scholars question the comparison. n362 However, the U.S. does exercise informal imperial rule when it has routine and consistent influence over the foreign policies of other nations, who risk losing "crucial military, economic, or political support" if they refuse to comply. n363 The "Status of Force Agreements" ("SOFAs") that govern legal rights and responsibilities of U.S. military personnel and others on U.S. bases throughout the world are typically one-sided. n364 And the U.S. occupations in Iraq and Afghanistan had a strong imperial dynamic because those regimes depended on American support. n365 [\*145] But **the management of empire is increasingly difficult in the era of globalization**. Heterogeneous contracting and divide-and-rule strategies tend to fail when peripheries can communicate with one another. The U.S. is less able control "the flow of information ... about its bargains and activities around the world." n366 In late 2008, negotiations on the Status of Force Agreement between the U.S. and Iraq were the subject of intense media scrutiny and became an issue in the presidential campaign. n367 Another classic imperial tactic - the use of brutal, overwhelming force to eliminate resistance to imperial rule - is also unlikely to be effective today. **The success of counterinsurgency operations depends on winning a battle of ideas**, **and collateral damage is used by violent extremists, through the Internet and satellite media, to "create widespread sympathy for their cause."** n368 **The abuses at Abu Ghraib, once public, harmed America's "brand" and diminished support for U.S. policy abroad. n369 Imperial rule, like hegemony, depends on maintaining legitimacy.** B. Constructing a Hegemonic Model International relations scholars are still struggling to define the current era. The U.S.-led international order is unipolar, hegemonic, and, in some instances, imperial. In any event, this order diverges from traditional realist assumptions in important respects. It is unipolar, but stable. It is more hierarchical. **The U.S. is not the same as other states**; **it performs unique functions in the world and has a government open and accessible to foreigners.** And the stability and legitimacy of the system depends more on successful functioning of the U.S. government as a whole than it does on balancing alliances crafted by elite statesmen practicing realpolitik. "**World power politics are shaped primarily not by the structure created by interstate anarchy but by the foreign policy developed in Washington**." n370 **These differences require a new model for assessing the institutional competences of the executive and judicial branches in foreign affairs.** [\*146] One approach would be to adapt an institutional competence model using insights from a major alternative theory of international relations - liberalism. Liberal IR theory generally holds that internal characteristics of states - in particular, the form of government - dictate states' behavior, and that democracies do not go to war against one another. n371 Liberalists also regard economic interdependence and international institutions as important for maintaining peace and stability in the world. n372 Dean Anne-Marie Slaughter has proposed a binary model that distinguishes between liberal, democratic states and non-democratic states. n373 Because domestic and foreign issues are "most convergent" among liberal democracies, Slaughter reasons, the courts should decide issues concerning the scope of the political branches' powers. n374 With respect to non-liberal states, the position of the U.S. is more "realist," and courts should deploy a high level of deference. n375 One strength of this binary approach is that it would tend to reduce the uncertainty in foreign affairs adjudication. Professor Nzelibe has observed that it would put courts in the difficult position of determining which countries are liberal democracies. n376 But even if courts are capable of making these determinations, they would still face the same dilemmas adjudicating controversies regarding non-liberal states. Where is the appropriate boundary between foreign affairs and domestic matters? How much discretion should be afforded the executive when individual rights and accountability values are at stake? To resolve these dilemmas, an institutional competence model should be applicable to foreign affairs adjudication across the board. In constructing a new realist model, it is worth recalling that the functional justifications for special deference are aimed at addressing problems of a particular sort of role effectiveness - which allocation of power among the branches will best achieve general governmental effectiveness in foreign affairs. In the twenty-first century, **America's global role has changed, and the best means of achieving effectiveness in foreign affairs have changed as well**. **The international realm remains highly political** - if not as much as in the past - but **it is American politics that matters most.** If the U.S. is truly an empire - [\*147] and in some respects it is - the problems of imperial management will be far different from the problems of managing relations with one other great power or many great powers. Similarly, **the management of hegemony or unipolarity requires a different set of competences.** Although American predominance is recognized as a salient fact, there is no consensus among realists about the precise nature of the current international order. n377 The hegemonic model I offer here adopts common insights from the three IR frameworks - unipolar, hegemonic, and imperial - described above. First, the "hybrid" hegemonic model assumes that the goal of U.S. foreign affairs should be the preservation of American hegemony, which is more stable, more peaceful, and better for America's security and prosperity, than the alternatives. **If the United States were to withdraw from its global leadership role, no other nation would be capable of taking its place. n378 The result would be radical instability and a greater risk of major war**. n379 In addition, the United States would no longer benefit from the public goods it had formerly produced; as the largest consumer, it would suffer the most. Second, the hegemonic model assumes that **American hegemony is unusually stable and durable**. n380 As noted above, **other nations have many incentives to continue to tolerate the current order**. n381 And although other nations or groups of nations - China, the European Union, and India are often mentioned - may eventually overtake the United States in certain areas, such as manufacturing, **the U.S. will remain dominant in most measures of capability for decades.** According to 2007 estimates, the U.S. economy was projected to be twice the size of China's in 2025. n382 **The U.S. accounted for half of the world's military spending in 2007 and holds enormous advantages in defense technology that far outstrip would-be competitors. n383 Predictions of American decline are not new, and they have thus far proved premature.** n384 [\*148] Third, **the hegemonic model assumes that preservation of American hegemony depends not just on power, but legitimacy**. n385 All three IR frameworks for describing predominant states - although unipolarity less than hegemony or empire - suggest that **legitimacy is crucial to the stability and durability of the system.** **Although empires and predominant states in unipolar systems can conceivably maintain their position through the use of force, this is much more likely to exhaust the resources of the predominant state and to lead to counter-balancing or the loss of control.** n386 **Legitimacy as a method of maintaining predominance is far more efficient.** The hegemonic model generally values courts' institutional competences more than the anarchic realist model. **The courts' strengths in offering a stable interpretation of the law, relative insulation from political pressure, and power to bestow legitimacy are important for realizing the functional constitutional goal of effective U.S. foreign policy**. This means that courts' treatment of deference in foreign affairs will, in most respects, resemble its treatment of domestic affairs. Given the amorphous quality of foreign affairs deference, this "domestication" reduces uncertainty. **The increasing boundary problems caused by the proliferation of treaties and the infiltration of domestic law by foreign affairs issues are lessened by reducing the deference gap**. And **the dilemma caused by the need to weigh different functional considerations** - liberty, accountability, and effectiveness - **against one another is made less intractable because it becomes part of the same project that the courts constantly grapple with in adjudicating domestic disputes.**

**Specifically, it stops cascading ethnic conflicts which culminate in nuclear war**

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Ironically, **at the same time that the demands of exclusive cultural groups for state sovereignty and "national self-determination" escalate around the globe, support for the international legal norms of established state sovereignty and non-intervention has also disappeared**. Together, **these** two **trends are dangerously explosive. We are likely to see more oppression of minorities in ethnically defined states**, more **slaughter of** innocent **civilians** caught in cultural conflicts, the **continued** **violent breakup of sovereign countries**, and **more invasions and occupation of disputed territory, as powerful countries--nursing other resentments and fears against one another**--seize the opportunity to **take sides. It will** thus **not be long until nuclear powers end up confronting one another. The** absurd **trigger for** this **conflict will be** the **nationalist demands of ethnic and sectarian political entrepreneurs**--who are often just thugs in disguise. Note the timing of the U.S. announcement of a missile defense pact with Poland, as Russian tanks rolled through Georgia to halt Georgia's military incursion into Ossetian territory. **Unless we act quickly to reach wider international agreement on global solutions to violent cultural disputes, more exclusive territorial claims of small and distinct cultural groups and violent responses to those claims will suck nuclear powers into deadly international conflict**. The crisis in **Georgia is not** an **isolated** one. **Across the globe we hear** the **battle cry of Kosovars, Tibetans, South Ossetians, Abkhazians, Kurds, Kashmiris and** so many **others**: “Give us a state of our own.” With few exceptions, that battle cry long ago slashed the world up into separate homogeneous ethnic and religious states, dislocating millions of people, sparking mass atrocities and forced expulsions, and igniting bouts of ethnic cleansing and genocide. In the remaining multi-ethnic societies of the 21st century, that battle cry threatens again; and with the non-intervention norm in tatters, the consequences will be disastrous. Because the earth does not hold enough land for each and every ethnic or religious group to own the piece that it thinks it deserves, secessionist attempts and communal conflicts over territory will escalate. The morally indignant will respond to this escalation with calls for humanitarian military missions to free one group from the oppression of another and support its "right" to exclusive territory. Those missions will be mired in the deadly consequences of communal conflict for long periods of time. Small secessionist groups will seek the "protection" of neighboring states, who are often only too eager to challenge their rivals. Tossing aside international law and claiming that they are on the side of the angels, powerful countries will continue to see disputed terrain as a strategic outpost for themselves, and they will help one ethnic or religious group oust the other. Cynically citing the international legal principle of non-intervention in the territory of a sovereign state, Russia opposed the U.S. when NATO bombed Serbia on behalf of ethnic Albanians there and again when it recognized Kosovo’s independence. But Russia--long before it granted diplomatic recognition of their independence--assisted South Ossetia and Abkhazia in their bid for secession from Georgia, with the knowledge that these groups could not exist on their own and would seek Russian protection--even annexation. And in that process, many innocent Georgians suffered--just as innocent Serbs suffered in Kosovo--people who just happened to be of the "wrong" ethnicity and living in the "wrong" place. **That suffering is rarely reported**. In 1993, in a war that was barely recognized and in a gruesome ethnic cleansing that boggles the imagination, 240,000 Georgians were expelled from Abkhazia. 100,000 Serbs were forced to leave Kosovo after 1999--another unrecognized ethnic clensing. Today, the homes and churches of the remaining Serbs living there are being destroyed by the Kosovars, who want the land for themselves alone. Gangs of Ossetian militias regularly destroy the homes of Georgians who have lived in the region for decades. In March we saw angry Tibetans, led by Buddhist monks, destroying the homes and shops of Chinese people living in Lhasa. Instead of supporting the human rights of all who live in multi-ethnic states and seeking to bring about sustainable harmony and justice, we have reached for a tempting but poisonous antidote to cultural conflict: the separation of ethnic and religious groups into new independent nation states. And though separation is sometimes warranted to halt communal violence, it creates new problems, does not solve the old ones, and chips away at the value of human equality. The **secession that separation entails leads to more bloodshed, more refugees, and more entrenched ethnic and religious hatred, more "humanitarian" intervention, more drawn-out military conflicts, more dangerous confrontations between powerful, nuclear-armed countries**. The same scenario will be acted out when we piously support dominant states who claim sovereignty over disputed territory and repress the secessionists. Repression leads to more violence as those who are oppressed are swayed to join the separatist cause. Instead of supporting ethnonationalist separatism in the guise of the right of “national self-determination” or opposing the intervention of others only when it suits our strategic interests, we need to take a consistent stand in support of human rights and equal treatment of all cultural groups within multiethnic societies. Of course this means both opposing oppression on the part of powerful states and opposing violent responses to that oppression. We can pressure China to halt abuses of Tibetans without abetting Tibetan secessionists; we can oppose Russia’s invasion of Georgia and its support for Ossetian secession without condoning Georgia’s military incursions into Ossetian territory. We must revive and strengthen the principle of non-intervention and at the same time, provide even stronger support for human rights in contested territory. **Only** the **revitalization and enforcement of international legal norms can halt the coming spiral of violent global confrontation triggered by ethnic and sectarian conflicts**.

**1AC Judicial Review**

**Contention two is Judicial Review:**

**Kiyemba undid Boumediene – rectifying this is a crucial test to maintain the court’s leadership as a model to be emulated**

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**The precedent of this Court has** a **significant impact on rule of law in foreign states. Foreign governments, in particular foreign judiciaries, notice and follow the example set by the U.S.** in **upholding** the **rule of law**. As foreign governments and judiciaries grapple with new and challenging issues associated with upholding the rule of law during times of conflict, **U.S. leadership on the primacy of law during the war on terror is particularly important.** Recent decisions of this Court have reaffirmed the primacy of rule of law in the U.S. during the war on terror. As relates to the present case, a number of this Court’s decisions, **most notably Boumediene v. Bush**, 128 S.Ct. 2229 (2008), have **established clear precedent that Guantanamo detainees have a right to petition for habeas corpus relief. Despite a clear holding from this Court in Boumediene, the Court of Appeals sought in Kiyemba v. Obama to narrow Boumediene to such a degree as to render this Court’s ruling hollow**. 555 F.3d 1022 (D.C. Cir. 2009). **The** present **case is** thus **a test of both the substance of the right granted in Boumediene and the role of this Court in ensuring faithful implementation of its prior decisions**. Although this Court’s rulings only have the force of law in the U.S., **foreign governments will take note of the decision in the present case and use the precedent set by this Court to guide their actions in times of conflict. PILPG has advised over two dozen foreign states on peace negotiations and post-conflict constitution drafting, as well as all of the international war crimes tribunals**. Through providing pro bono legal assistance to foreign governments and judiciaries, PILPG has **observed the** important **role** this **Court and U.S. precedent serve in promoting rule of law in foreign states. In Uganda, for example, the precedent established by this Court in Hamdan v. Rumsfeld**, 548 U.S. 557 (2006), and Boumediene, **influenced judges and legislators to incorporate the principles of judicial review and enforceability in their domestic war crimes bill. In Nepal, this Court has served as a model for the nascent judiciary. In Somaliland, the government relied heavily on U.S. terrorism legislation when drafting terrorism legislation for the region. And in the South Sudan peace process, the Sudan People’s Liberation Movement/Army (SPLM/A), the leading political party in the Government of Southern Sudan, relied on U.S. precedent to argue for the primacy of law and the importance of enforceability of previous adjudicative decisions** in the5 Abyei Arbitration, one of the most important and contentious issues in the ongoing implementation of the peace agreement. **Foreign judges** also **follow the work of this Court closely**. In a number of the judicial training programs PILPG has conducted, foreign judges have asked PILPG detailed questions about the role of this Court in upholding rule of law during the war on terror. A review of foreign precedent confirms how closely foreign judges follow this Court. **In numerous foreign states, and in the international war crimes tribunals, judges regularly cite the precedent of this Court to establish their own legitimacy, to shore up judicial authority against overreaching by powerful executives, and to develop a strong rule of law within their own legal systems. Given** the **significant influence of this Court** on foreign governments and judiciaries, **a decision in Kiyemba implementing Boumediene will reaffirm this Court’s leadership in upholding the rule of law and promote respect for rule of law in foreign states during times of conflict**.6 ARGUMENT I. **KIYEMBA v. OBAMA IS A TEST OF SUPREME COURT LEADERSHIP IN UPHOLDING RULE OF LAW IN TIMES OF CONFLICT**. **The precedent set by the Supreme Court in the present case will have a significant impact on the development of rule of law in foreign states.** **Foreign judicial, executive, and parliamentary bodies closely follow the work of this Court, and this Court’s previous decisions related to the war on terror have shaped how foreign states uphold the rule of law in times of conflict**. **Foreign governments and judiciaries will review this Court’s decision in the present case in light of those previous decisions**. **A decision in the present case implementing previous decisions of this Court granting habeas rights to Guantanamo detainees is an opportunity for this Court to reaffirm to foreign governments that the U.S. is a leader and role model in upholding the rule of law during times of conflict**. Recent Supreme Court precedent established a clear role for the primacy of law in the U.S. war on terror. In particular, this Court’s landmark decision in **Boumediene highlighted the critical role of the judiciary in a system dedicated to the rule of law, as well as the “indispensable” role of habeas corpus** as a “time tested” safeguard of liberty. Boumediene v. Bush, 128 S.Ct. 2229, 2247, 2259 (2008). **Around the globe, courts and governments took note of this Court’s stirring words**: “Security subsists, too, in fidelity to freedom’s first principles. **Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty7 that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.”** Id. at 2277. In contrast to the maxim silent enim leges inter arma (in times of conflict the law must be silent), this Court affirmed in Boumediene that “[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled, and in our system they are reconciled within the framework of the law.” Id. Boumediene held that the detainees in the military prison at Guantanamo Bay are “entitled to the privilege of habeas corpus to challenge the legality of their detentions.” Id. at 2262. Inherent in that privilege is the right to a remedy if the detention is found to be unlawful. In the present case, the Petitioners, who had been found not to be enemy combatants, sought to exercise their privilege of habeas corpus. The Executive Branch conceded that there was no legal basis to continue to detain the Petitioners, that years of diligent effort to resettle them elsewhere had failed, and that there was no foreseeable path of release. The District Court implemented Boumediene, ordering that the Petitioners be brought to the courtroom to impose conditions of release. In re Guantanamo Bay Detainee Litigation, 581 F. Supp. 2d 33, 42-43 (D.C. Cir. 2008). The Court of Appeals reversed, with the majority concluding that the judiciary had no “power to require anything more” than the Executive’s representations that it was continuing efforts to find a foreign country willing to admit Petitioners. Kiyemba v. Obama, 555 F.3d 1022, 1029 (D.C. Cir. 2009). **The Court of Appeals’ decision effectively narrowed Boumediene to such a degree that it rendered the ruling hollow**. Circuit Judge Rogers recognized this in her dissent, opining that the majority’s analysis “was not faithful to Boumediene.” Id. at 1032 (Roberts, J., dissenting). **Given the Court of Appeals’ attempt to narrow Boumediene, Kiyemba v. Obama is a test of this Court’s role in upholding the primacy of law in times of conflict**. **A decision in favor of the Petitioners in Kiyemba will reaffirm this Court’s leadership in upholding the rule of law and promote respect for rule of law in foreign states during times of conflict**. II. PILPG’S EXPERIENCE ADVISING FOREIGN GOVERNMENTS AND JUDICIARIES ILLUSTRATES THE IMPORTANCE OF SUPREME COURT PRECEDENT IN PROMOTING RULE OF LAW IN FOREIGN STATES DURING TIMES OF CONFLICT. **During PILPG’s work providing pro bono legal assistance to foreign governments and judiciaries on the rule of law in conflict and post-conflict settings, clients frequently request guidance on U.S. laws and the role of the judiciary in the U.S. system of governance**. In recent years, **as states have watched the U.S. tackle the legal issues surrounding the war on terror, foreign governments and judiciaries have expressed keen interest in, and have demonstrated reliance on, the legal mechanisms the U.S. has adopted to address the challenges presented in this new form of conflict**. The U.S. Government, under the guidance of this Court, has set a strong example for upholding the rule of law during times of conflict, and foreign governments have followed this lead.

**Re-affirming habeas shapes global legal development through judicial dialogue – a credible remedy is essential**

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TRANSNATIONAL JUDICIAL DIALOGUE CONFIRMS THIS COURT’S LEADERSHIP IN PROMOTING ADHERENCE TO RULE OF LAW IN TIMES OF CONFLICT. **PILPG’s on-the-ground experience demonstrating the leadership of this Court is confirmed by a study of transnational judicial dialogue**. Over the past halfcentury, **the world’s constitutional courts have been engaged in a rich and growing transnational judicial dialogue on a wide range of constitutional law issues**. See, e.g., Melissa A. Waters, Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law, 93 Geo. L.J. 487 (2005); Anne-Marie Slaughter, Judicial Globalization, 40 Va. J. Int’l L. 1103 (2000). **Courts around the world consider, discuss, and cite foreign judicial decisions** not out of a sense of legal obligation, but **out of a developing sense that foreign decisions are valuable resources in elucidating complex legal issues and suggesting new approaches to common problems.** See Waters, supra, at 493-94. In this transnational judicial dialogue, **the decisions of this Court have exercised a** profound — and **profoundly positive — influence on the work of foreign and international courts**. See generally Constitutionalism and Rights: The Influence of the United States Constitution Abroad (Louis Henkin & Albert J. Rosenthal eds., 1990); Anthony Lester, The Overseas Trade in the American Bill of Rights, 88 Colum. L. Rev. 537 (1988). As Anthony Lester of the British House of Lords has noted, “**there is a vigorous overseas trade in the Bill of Rights, in** international and constitutional **litigation involving norms derived from American constitutional law**. When life or liberty is at stake, **the landmark judgments of the Supreme Court** of the United States, giving fresh meaning to the principles of the Bill of Rights, are **studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C**.” Id. at 541. This Court’s overseas influence is not limited to the Bill of Rights. **From Australia to India to Israel to the United Kingdom, foreign courts have looked to the seminal decisions of this Court** **as support for their own rulings upholding judicial review, enforcing separation of powers, and providing a judicial check on the political branches**. Indeed, for foreign courts, this Court’s rulings in seminal cases such as Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803),4 Brown v. Board of Education, 347 U.S. 436 (1954),5 United States v. Nixon, 418 U.S. 683 (1974),6 and Roper v. Simmons, 543 U.S. 551 (2005)7 take on a special significance. **Reliance on the moral authority of this Court can provide invaluable support for those foreign courts struggling to establish their own legitimacy, to shore up judicial authority against overreaching by powerful executives, and to develop a strong rule of law within their own national legal systems. This Court’s potential to positively influence the international rule of law is particularly important in the nascent transnational judicial dialogue surrounding the war on terrorism and the primacy of rule of law in times of conflict. As the world’s courts begin to grapple with** the **novel, complex, and delicate legal issues surrounding the modern-day war on terrorism**, **and as states seek to develop judicial mechanisms to address domestic conflicts**, **foreign governments and judiciaries are confronting similar challenges**. In particular, **foreign governments and judiciaries must consider how to accommodate the legitimate needs of the executive branch** in times of war within the framework of the law. Although foreign courts are just beginning to address these issues, **it is already clear that they are looking to the experience of the U.S., and to the precedent of this Court, for guidance on upholding the rule of law in times of conflict.** In recent years, **courts in Israel, the United Kingdom, Canada, and Australia have relied on the precedent of this Court in decisions addressing the rights of detainees.**8 In short, **as a result of this Court’s robust influence on transnational judicial dialogue, its decisions have proved extraordinarily important to the development of the rule of law around the world**. **International courts have** similarly **relied on the precedent of this Court in influential decisions.** For example, in the important and developing area of international criminal law, **the international war crimes tribunals for Yugoslavia and Rwanda both relied heavily on the precedent of this Court** in their early opinions. In the first five years of the Yugoslav Tribunal, the first in the modern iteration of the war crimes tribunals, **the justices cited this Court at least seventeen times in decisions establishing the fundamental legal principles** under which the Tribunal would function.9 **The International Criminal Tribunal for Rwanda** similarly **relied on this Court’s precedent, citing this Court at least twelve times in its first five years.**10 **The precedent of this Court has provided a crucial foundation for international criminal law**. **The reliance on the precedent of this Court speaks to the Court’s international leadership on the promotion of respect for the rule of law** in times of conflict. **By ruling** in favor of the Petitioners, **this Court will reaffirm the precedent established in its prior decisions granting habeas rights to Guantanamo detainees and, in doing so, demonstrate to these foreign courts, and to other courts who will be addressing these issues in the future, that all branches of government must be bound by the rule of law, even in the most challenging of times**. CONCLUSION For the aforementioned reasons, **this Court should reverse the decision of the Court of Appeals**, thereby **reaffirming this Court’s leadership in upholding the rule of law and promoting respect for rule of law in foreign states during times of conflict.**

**A strong judiciary is the key factor**

**Kalb 13** [Summer, 2013; Johanna Kalb is an Associate Professor of Law, Loyola University New Orleans College of Law, “The Judicial Role in New Democracies: A Strategic Account of Comparative Citation”, 38 Yale J. Int'l L. 423]

**The role of the judiciary in transitional regimes has received increasing attention in the last few decades** based largely on two historical developments. First, **constitutionalism and judicial review have become increasingly pervasive attributes** of late twentieth-century political transitions, **which has increased the predominance of the judicial role in most new democratic regimes**. Second, **a growing number of countries that once held democratic elections have regressed into authoritarian or semi-authoritarian rule** n38 or have simply failed to move beyond the thin electoral definition of democracy. n39 In this historical context, scholars have turned their focus to the role that courts can play in helping to consolidate or solidify the post-election transition to a democratic order. A. Diagonal Accountability According to Juan J. Linz and Alfred Stepan, democratic consolidation is complete when a government comes to power that is the direct result of a free and popular vote, when this government de facto has the authority to generate new policies, and [\*431] when the executive, legislative, and judicial power generated by the new democracy does not have to share power with other bodies de jure. n40 As is now widely acknowledged, **the project of democratic consolidation is inhibited by accountability failures in political institutions**. In other words, **democracy stalls** n41 or collapses **because institutional weaknesses undermine the processes by which governmental actors are held responsible for performing their appropriate functions. Courts can aid** in democratic consolidation **by reinforcing constitutional structures of accountability** across a number of different planes. First, **a credible and autonomous judiciary may serve as an important mechanism of horizontal accountability**. "In institutionalized democracies, **accountability runs ... horizontally across a network of relatively autonomous powers** (i.e. other institutions) **that can call into question, and** eventually **punish, improper ways of discharging** the **responsibility** of a given official." n42 **Given the primacy of judicial review** in most new regimes, **courts are well positioned to ensure that other governmental actors are subject to the constraints of the law**. **An effective judiciary may thus be a key institutional actor in preventing the reconsolidation of power** in the executive that has characterized so many nations in transition. n43 **Courts** also **play a role in vertical accountability, which can** be understood to **characterize the relationship between the citizenry and the national government**. In introducing this concept, Guillermo O'Donnell focuses on the methods by which nonstate actors in media and civil society can continue to hold state actors to account through regular election, social mobilization, and media oversight. n44 **An effective judiciary can protect and enable these processes of vertical accountability by ensuring governmental respect for the individual rights that underlie them** - for example, **by ensuring access to the voting booth and protecting freedom of speech and association.** [\*432] While O'Donnell's vertical axis ended with the national government, in the democracies of the last fifty years, the notion of vertical accountability arguably extends further to characterize the relationship between the domestic population, the national government, and the international community, which includes international courts, the governments of other nations, and international NGOs. Most **recent democratic transitions were in fact driven by pressures from both internal and external constituencies**, sometimes in concert. n45 For example, "**few would question the central role played by occupation forces in fostering democratic government** in Germany and Japan after World War II," while "the American security umbrella played a similar facilitating function for democracy in South Korea, and Taiwan." n46 In recent decades, international sanctions have helped to force internal political change (perhaps most notably in South Africa), while "the export of election monitoring technologies such as parallel vote tabulation and exit polls played a crucial role in bringing down Augusto Pinochet in Chile in 1988, unseating Slobodan Milo<hac s>evic in Serbia in 2000, and sparking the Orange Revolution in 2004." n47 In each of these cases, donor funding has helped to generate and preserve a global web of civil society groups, which has helped to inspire and operationalize the indispensable efforts of domestic advocates during transitions. n48 Moreover, even long after the formal democratic transition has occurred, new governments, particularly in the economically underdeveloped countries of the Global South, continue to confront pressures from the international community to maintain systems of democratic governance, to protect and promote human rights, and to facilitate economic integration. Thus, **governmental actions during the transitional period and beyond are under increased levels of scrutiny from both vertical and horizontal audiences**, which can mobilize each other in support of accountability at the national level. **The judiciary can also play a role in mediating these relationships by protecting the domestic rights that enable these transnational connections** - by protecting access to the Internet and to international travel, for example. **The ongoing activity along both of the axes creates the opportunity for the judiciary to engage in what we may describe as "diagonal accountability.**" **n49 In modern [\*433] regimes in transition, the judiciary must be responsive to activities on both the vertical and horizontal axes.** The challenge is in satisfying these different audiences that are sometimes in harmony and sometimes in conflict. **The courts**, given their responsibility for preserving the possible channels of horizontal and vertical accountability, **are uniquely positioned to manage this overlap** and can mobilize one axis "diagonally" in support of promoting accountability along the other. **Courts may draw on international support "vertically" to protect against encroachment from the other branches "horizontally**" - for example, by reaching out to influential international institutions to put pressure on the president to comply with judicial orders limiting executive authority. Alternatively, **courts may be well positioned to safeguard the authority of other domestic institutions along the horizontal axis by acting as a site of resistance against coercive international pressures** - for example, **by striking down as unconstitutional domestically unpopular legislation forced on the elected branches by international actors.**

**Strong democracy maintains global peace – the best research proves**

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**Drawing from** the **empirical literature, this paper identifies** two **underlying pathways through which** state **governance** systems help to **build peace. These are: State capacity. If states lack** the **ability to execute** their **policy goals or to maintain security** and public order **in the face of potentially violent groups, armed conflict is more likely. State capacity refers to two significant aspects: security capacity and social capacity. Security capacity includes** the **ability to control territory and resist armed incursion from other states and nonstate actors. Social capacity includes the ability to provide social services and public goods. Institutional qxuality. Research suggests** that **not all governance systems are equally effective or capable of supporting peace. Governance systems are seen as more credible and legitimate, and are better at supporting peace, when** they are **characterized by inclusiveness, representativeness, transparency, and accountability**. In particular, systems allowing citizens to voice concerns, participate politically, and hold elected leaders accountable are more stable and better able to avoid armed conflict. **Both dimensions**—state capacity and quality—**are crucial to** the **prevention of armed conflict** and are the focus of part one of this paper. Part two of the paper focuses on **democracy as the most common way of structuring state government to allow for inclusive systems while maintaining state capacity. The** two **parts summarize important research findings on** the **features of governance that are most strongly associated with prospects for peace. Our analysis, based on** an **extensive review of empirical literature, seeks to identify** the **specific dimensions of governance** that are **most strongly associated with peace. We show evidence of a direct link between peace and a state’s capacity to both exert control over its territory and provide a full range of social services through effective governance institutions**. We apply a governance framework to examine three major factors associated with the outbreak of war—border disputes, ethnic conflict, and dependence on commodity exports—and emphasize the importance of inclusive and representative governance structures for the prevention of armed conflict.

**The converse is true, backsliding causes great power war**

**Gat 11**, Professor at Tel Aviv University, Ezer Weizman Professor of National Security at Tel Aviv University, Azar 2011, “The Changing Character of War,” in The Changing Character of War, ed. Hew Strachan and Sibylle Scheipers, p. 30-32

Since 1945, **the decline of major great power war has deepened** further. Nuclear weapons have concentrated the minds of all concerned wonderfully, but no less important have been the institutionalization of free trade and the closely related process of rapid and sustained economic growth throughout the capitalist world. The communist bloc did not participate in the system of free trade, but at least initially it too experienced substantial growth, and, unlike Germany and Japan, it was always sufﬁciently large and rich in natural resources to maintain an autarky of sorts. With the Soviet collapse and with the integration of the former communist powers into the global capitalist economy, the prospect of a major war within the developed world seems to have become very remote indeed. This is one of the main sources for the feeling that war has been transformed: its geopolitical centre of gravity has shifted radically. The modernized, economically developed parts of the world constitute a ‘zone of peace’. **War now seems to be conﬁned to the less-developed parts of the globe, the world’s ‘zone of war’,** **where countries that have** so far **failed to embrace modernization and its pacifying spin-off effects continue to be engaged in wars** among themselves, as well as with developed countries.¶ While the trend is very real, **one wonders if the** near **disappearance of armed conﬂict within the developed world is likely to** **remain as stark** **as it has been since the collapse of communism**. **The post-Cold War moment** may turn out to **be** a **ﬂeeting** one. **The probability of major wars within the developed world remains low**—because of the factors already mentioned: increasing wealth, economic openness and interdependence, and nuclear deterrence. **But the deep sense of change** prevailing since 1989 **has been based on the far more radical notion that the triumph of capitalism** also **spelled the irresistible ultimate victory of democracy**; and that in an afﬂuent and democratic world, major conﬂict no longer needs to be feared or seriously prepared for. **This notion**, however, **is** **fast eroding** **with the return of capitalist non-democratic great powers that have been absent from the international system since 1945**. Above all, there is the formerly communist and fast industrializing authoritarian-capitalist **China**, whose massive growth **represents the greatest change in the global balance of power. Russia**, too, **is retreating from its postcommunist liberalism and assuming an increasingly authoritarian character**.¶ **Authoritarian capitalism may be more viable than people tend to assume**. 8 The communist great powers failed even though they were potentially larger than the democracies, because their economic systems failed them. By contrast, the **capitalist authoritarian/totalitarian powers during the ﬁrst half of the twentieth century, Germany and Japan**, particularly the former, **were as efﬁcient economically as**, **and** if anything **more successful militarily than,** **their democratic counterparts**. They were defeated in war mainly because they were too small and ultimately succumbed to the exceptional continental size of the United States (in alliance with the communist Soviet Union during the Second World War). However, the **new non-democratic powers are both** **large and capitalist.** **China** in particular **is the largest player in the international system in terms of population and is showing spectacular economic growth** that within a generation or two is likely to make it a true non-democratic superpower.¶ Although **the return of capitalist non-democratic great powers** does not necessarily imply open conﬂict or war, it **might indicate that the democratic hegemony since the Soviet Union’s collapse could be** **short-lived** **and that** **a universal ‘democratic peace’ may still be far off**. The new capitalist authoritarian powers are deeply integrated into the world economy. They partake of the development-open-trade-capitalist cause of peace, but not of the liberal democratic cause. Thus, it is crucially important that any protectionist turn in the system is avoided so as to prevent a grab for markets and raw materials such as that which followed the disastrous slide into imperial protectionism and conﬂict during the ﬁrst part of the twentieth century. Of course, the openness of the world economy does not depend exclusively on the democracies. In time, China itself might become more protectionist, as it grows wealthier, its labour costs rise, and its current competitive edge diminishes.¶ With the possible exception of the sore Taiwan problem, China is likely to be less restless and revisionist than the territorially conﬁned Germany and Japan were. Russia, which is still reeling from having lost an empire, may be more problematic. However, **as China grows in power, it is likely to become more assertive,** **ﬂex its muscles, and behave like a superpower**, even if it does not become particularly aggressive. The **democratic and non-democratic powers may coexist more or less peacefully**, albeit warily, side by side, armed because of mutual fear and suspicion, as a result of the so-called ‘security dilemma’, and against worst-case scenarios. **But there is** also **the prospect of** **more antagonistic relations**, **accentuated ideological rivalry**, **potential and actual conﬂict,** **intensiﬁed arms races**, and even new cold wars, with spheres of inﬂuence and opposing coalitions. Although great power relations will probably vary from those that prevailed during any of the great twentieth-century conﬂicts, as conditions are never quite the same, they may vary less than seemed likely only a short while ago.

**Specifically, re-affirmation of rule of law principles on detention causes Iraqi modelling – that staves off civil war**

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As the foregoing examples illustrate, **foreign governments rely on the precedent set by the U.S. and this Court when addressing new and complex issues in times of conflict**. **Finding for the Petitioners in the present case will reaffirm this Court’s leadership in promoting respect for rule of law in foreign states during times of conflict.** B. **Foreign Judges Follow U.S. and Supreme Court Leadership in Times of Conflict.** In addition to its work advising foreign governments, **PILPG has been and continues to be involved in a number of judicial training initiatives in foreign states**. **These initiatives aim to foster independent and fair judicial systems in transitional and post-conflict states throughout Central and Eastern Europe, Africa, and the Middle East**. In these trainings, **PILPG frequently relies on the work of this Court to illustrate and promote adherence to the rule of law**. In 2004, for example, **PILPG led a week-long training session for Iraqi judges** in Dubai **on due process and civil liberties protections** to institute in the new post-Saddam legal system. Th**e training was seen as an important step toward the democratization of Iraq**, and something that would hasten the ability of the U.S. to withdraw its troops from Iraq. **On the second day** of the training program, local and **international media published the leaked photos of the abuses at Abu Ghraib.** **The Iraqi judges would not allow the training sessions to continue until PILPG answered to their satisfaction questions about whether the U.S. judicial system could ensure that the perpetrators would be brought to justice**, that the victims would be able to bring suit for their injuries, and that the abuses would be halted. When PILPG returned for another training session several months later, **the Iraqi judges had mixed reactions to the prosecutions of the Abu Ghraib perpetrators**. **Some judges perceived the U.S. Prosecutions of the perpetrators as not aggressive enough, which left the Iraqi judges with the impression that the U.S. was not leading by example**. Although other Iraqi judges appreciated and sought to follow the U.S. example to try those responsible for abuses before an independent tribunal, it was clear that **Abu Ghraib temporarily set back U.S. efforts to establish rule of law in Iraq.** A year later, in 2005, **PILPG conducted training sessions for the Iraqi high tribunal judges who would be presiding over the trial of Saddam Hussein** and other former leaders of the ba’athist regime. Even more than the human rights training of ordinary Iraqi judges discussed above, **the successful operation of the Iraqi high tribunal was seen as critical to suppressing the spread of sectarian violence and heading off a full-scale civil war in Iraq**. The objectives of the tribunal were twofold. First, the tribunal sought to bring those most responsible for the atrocities committed under the Ba’athist regime before an independent panel of judges to be tried under international standards of justice. Second, the tribunal sought to establish a model for upholding and implementing rule of law in Iraq and to demonstrate that the need for rule of law is greatest in response to the gravest atrocities. During the training sessions, **the Iraqi judges requested guidance on controlling disruptive defendants in the courtroom**. Specifically, **the judges asked whether they could bind and gag the defendants in the courtroom as they understood had been done to the defendants in the 1969 “Chicago Seven” trial in the U.S.** **PILPG explained that the U.S. Court of Appeals had ultimately overturned the convictions** in that case, in part because of the mistreatment of the defendants in the courtroom. United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972). **This information persuaded the Iraqi judges to seek less draconian means of control** in the trial of Saddam Hussein, which was televised gavel to gavel in Iraq. See generally Michael Newton and Michael Scharf, Enemy of the State: The Trial and Execution of Saddam Hussein (2008). **Foreign judicial interest in U.S. respect for rule of law during the war on terror is not limited to Iraqi judges**. In 2006, PILPG conducted sessions in a weeklong rule of law training program in Prague for fifty judges from former Soviet Bloc countries in Eastern Europe. At the start of the first session, one of the judges asked “Sobriaetes’ li vi goverit’ o slone v komnate?,” which translates to “Are you going to be addressing the elephant in the room?” Michael P. Scharf, The Elephant in the Room: Torture and the War on Terror, 37 Case W. Res. J. Int’l L. 145, 145 (2006). **The question referred to the so-called “White House Torture Memos,” released just before the training session began**, which asserted that Common Article 3 of the 1949 Geneva Conventions was not applicable to detainees held at Guantanamo Bay and which **provided justification for Military Commissions whose procedures would not meet the Geneva standards**. Id. at 145-46. **The group of judges asked PILPG to explain “how representatives of the U**nited **S**tates **could expect to be taken seriously in speaking about the importance of human rights law when the United States itself has recently done so much that is contrary to that body of law in the context of the so-called ‘Global War on Terror.**’” Id. at 145. PILPG addressed judges’ concerns by explaining that the President’s decision to establish Military Commissions via Executive Order, and whether those Commissions had to comport with the Geneva Conventions, was currently being reviewed by this Court in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), and that the Executive Branch would be bound to follow the holding of this Court. Scharf, supra, at 148. **Foreign judges closely follow the work of this Court and the example set by the U.S. Government in upholding the rule of law during the war on terror**. **As these examples illustrate, when the U.S. upholds the rule of law, foreign judges are more likely to follow.**

**Democratic stability prevents outbreak of Middle Eastern war – the threat is under-estimated**

**Cordesman 13**, Anthony H. Cordesman holds the Arleigh A. Burke Chair in Strategy at CSIS, Iraq: The New Strategic Pivot in the Middle East, http://csis.org/publication/iraq-new-strategic-pivot-middle-east

**It is hard to determine why Iraq receives so little U.S. attention as it drifts towards sectarian conflict, civil war, and alignment with Iran. Tensions** in Iraq **have been rising** for well over a year, and **the UN warned** on June 1, 2013 that “1,045 Iraqis were killed and another 2,397 were wounded in acts of terrorism and acts of violence in May. The number of civilians killed was 963 (including 181 civilian police), and the number of civilians injured was 2,191 (including 359 civilian police). A further 82 members of the Iraqi Security Forces were killed and 206 were injured.”

This **neglect may be a matter of war fatigue**; the result of a conflict the United States “won” at a tactical level but seems to have lost at a strategic level. It may be the result of the fact the civil war in Syria is more intensive, produces more human suffering, and is more open to the media. The end result, however, is that that **the U**nited **S**tates **is just beginning to see how much of a strategic pivot Iraq has become**.

The **strategic map of the region is changing and Iraq’s role** in that change **is critical. It used to be possible to largely separate the Gulf and** the **Levant. One set of tensions focused on the Arab-Israel conflict versus tensions focused on the Gulf. Iraq stood between them. It sometimes became a crisis on its own but always acted as a strategic buffer between two major subregions in the Middle East.**

However, it has become clear over the last year that the upheavals in the Islamic and Arab world have become a clash within a civilization rather than a clash betweencivilizations. The Sunni vs. Alewite civil war in Syria is increasingly interacting with the **Sunni versus Shi’ite tensions in the Gulf that are edging Iraq back towards civil war. They also interact with the Sunni-Shi’ite, Maronite, and other** confessional **struggles in Lebanon**.

**The “Kurdish problem**” now **spreads from Syria to Iraq to Turkey to Iran**. The question of Arab identity versus Sunni or Shi’ite sectarian identity divides Iraq from the Arab Gulf states and pushes it towards Iran. **Instead of terrorism we have counterinsurgency, instability, and religious and ethnic conflict.**

**For all the current attention to Syria, Iraq is the larger and more important state**. Iraq **is a nation of 31.9 million** and Syria is a nation of 22.5 million. **Iraq has the larger economy**: Iraq has a GDP of $155.4 billion, and Syria had a GDP of $107.6 billion in 2011, the last year for which there are useful data. Most important, **Iraq is a critical petroleum state** and Syria is a cypher. Iraq has some 143 billion barrels worth of oil reserves (9 percent of world reserves) and Syria has 2.5 billion (0.2 percent). Iraq has 126.7 has trillioncubic meters of gas, and Syria has 10.1. **Iraq has a major impact on the overall security of the Gulf, and some 20 percent of the world oil** and LNG exports **go through the Gulf**.

This does not mean the conflict in Syria is not tragic or that it is not important. But from a practical strategic viewpoint, **Iraq divided Iran from the Arab Gulf states. Iraqi-Iranian tensions acted as a strategic buffer between Iran and the rest of the Middle East for half a century** between the 1950s and 2003. **Today, Iraq has s Shi’ite government with close links to Iran and is a military vacuum. Iraq’s Shi’ite leaders treat its Sunnis and Kurds more as a threat than as countrymen. Its Arab neighbors treat Iraq’s regime more as a threat than an ally, and the growing Sunni-Shi’ite tension in the rest of the region make things steadily worse in Iraq and drive it towards Iran.**

**If Iraq moves towards active civil war**, its **Shi’ites will be driven further towards Iran and Syria. If Assad survives and the Arab Gulf states continue to isolate Iraq**, the largely token U.S. presence in Iraq is likely to become irrelevant and **Iraq is likely to become part of a “Shi’ite” axis going from Lebanon to Iran. If Assad falls, and U.S. and Gulf Arab tensions with Iran continue to rise, Iran seems likely to do everything it can to replace its ties to Syria with influence in Iraq.**

If Iraq moves towards active civil war, its Shi’ites will be driven further towards Iran and Syria. If Assad survives and the Arab Gulf states continue to isolate Iraq, the largely token U.S. presence in Iraq is likely to become irrelevant and Iraq is likely to become part of a “Shi’ite” axis going from Lebanon to Iran. If Assad falls, and U.S. and Gulf Arab tensions with Iran continue to rise, Iran seems likely to do everything it can to replace its ties to Syria with influence in Iraq.

Arab and Turkish pressure on Iraq seems more likely to push Iraq towards Iran than away from it. **If Iraq becomes caught up in sectarian and ethnic civil war, this will push its Shi’ite majority towards Iran, push its Kurds toward separatism, and push the Arab states around Iraq to do even more to support Sunni factions in Lebanon, Syria, and Iraq while suppressing their own Shi’ites**.

The United States has limited cards to play. The U.S.-Iraqi Strategic Framework Agreement exists on paper, but it did not survive the Iraqi political power struggles that came as the United States left. The U.S. military presence has been reduced to a small U.S. office of military cooperation at the U.S. Embassy in Baghdad and it is steadily shrinking. The cumbersome U.S. arms transfer process has already pushed Iraq to buy arms from Russia and other suppliers. The U.S. State Department’s efforts to replace the military police training program collapsed before they really began. The United States is a marginal player in the Iraqi economy and economic development, and its only aid efforts are funded through money from past years. The State Department did not make an aid request for Iraq for FY2014.

However, it is far from clear that Prime Minister Nouri al-Maliki or most of the Shi’ite ruling elite really want alignment with Iran or that anyone in Iraq wants civil war. A revitalized U.S. office of military cooperation and timely U.S. arms transfer might give the United States more leverage, and U.S. efforts to persuade Arab Gulf states that it is far better to try to work with Iraq than isolate it might have a major impact. Limited and well-focused U.S. economic and governance aid might improve leverage in a country that may have major oil export earnings but whose economy needs aid in reform more than money and today has the per capita income of a poverty state, ranking only 162 in the world.

Making Iraq a major strategic focus in dealing with Turkey and our Arab friends and allies might avoid creating a strategic bridge between Iran and the Gulf states. It might limit the growing linkages between the tensions and conflicts in the Gulf and those in the Levant, and help secure Jordan, Lebanon, and Egypt. It would not be a major expense to give the State Department’s country team in Baghdad all of the aid resources it needs to move Iraq towards economic reform and a stable military.

Even limited success in damping down internal conflict in Iraq and helping Iraq keep a distance from Iran might save the United States far more, even in the short run, than substituting strategic neglect for strategic patience. It also might help prevent Iraq from becoming a far worse civil conflict than now exists in Syria, **fueling the religious war** between Sunnis and Shi’ites, **which can turn** a clash withina civilization **into a serious war and spill over into terrorism in the West**.

**Extinction**

**Russell 9** James, Senior Lecturer Department of National Security Affairs, Spring, “Strategic Stability Reconsidered: Prospects for Escalation and Nuclear War in the Middle East” Security Studies Center Proliferation Papers, http://www.analyst-network.com/articles/141/StrategicStabilityReconsideredProspectsforEscalationandNuclearWarintheMiddleEast.pdf

**Strategic stability in the region is thus undermined by various factors**: (1) **asymmetric interests in the bargaining framework that can introduce unpredictable behavior from actors;** (2) **the presence of non-state actors that introduce unpredictability into relationships** between the antagonists; (3) **incompatible assumptions about the structure of the deterrent relationship** that makes the bargaining framework strategically unstable; (4) **perceptions by Israel and the United States that its window of opportunity for military action is closing, which could prompt a preventive attack**; (5) **the prospect that Iran’s response to pre-emptive attacks could involve unconventional weapons, which could prompt escalation** by Israel and/or the United States; (6) **the lack of a communications framework to build trust and cooperation among framework participants.** These systemic weaknesses in the coercive bargaining framework all suggest that **escalation by any the parties could happen either on purpose or as a result of miscalculation or the pressures of wartime circumstance**. Given these factors, **it is disturbingly easy to imagine scenarios under which a conflict could quickly escalate in which the regional antagonists would consider the use of chemical, biological, or nuclear weapons. It would be a mistake to believe the nuclear taboo can somehow magically keep nuclear weapons from being used in the context of an unstable strategic framework. Systemic asymmetries between actors in fact suggest a certain increase in the probability of war – a war in which escalation could happen quickly and from a variety of participants. Once such a war starts, events would likely develop a momentum all their own and decision-making would consequently be shaped in unpredictable ways**. The international community must take this possibility seriously, and muster every tool at its disposal to prevent **such an outcome**, which **would be an unprecedented disaster for the peoples of the region, with substantial risk for the entire world.**

**The plan is necessary for Nepalese modelling**

**Scharf 9**, Professor Michael P. Scharf, PILPG Managing Director, John Deaver Drinko — Baker & Hostetler Professor of Law and Director of the Frederick K. Cox International Law Center at the Case Western Reserve University School of Law, BRIEF OF THE PUBLIC INTERNATIONAL LAW & POLICY GROUP AS AMICUS CURIAE IN SUPPORT OF PETITIONERS, www.americanbar.org/content/dam/aba/publishing/preview/publiced\_preview\_briefs\_pdfs\_09\_10\_08\_1234\_PetitionerAmCuPILPG.authcheckdam.pdf

II. PILPG’S EXPERIENCE ADVISING FOREIGN GOVERNMENTS AND JUDICIARIES ILLUS- TRATES THE IMPORTANCE OF SUPREME COURT PRECEDENT IN PROMOTING RULE OF LAW IN FOREIGN STATES DURING TIMES OF CONFLICT. During PILPG’s work providing pro bono legal assistance to foreign governments and judiciaries on the rule of law in conflict and post-conflict settings, clients frequently request guidance on U.S. laws and the role of the judiciary in the U.S. system of governance. In recent years, as **states** have **watched the U.S. tackle the legal issues surrounding the war on terror, foreign governments and judiciaries have expressed keen interest in, and have demonstrated reliance on, the legal mechanisms the U.S. has adopted to address the challenges presented in this new form of conflict. The** **U.S.** Government, **under the guidance of this Court, has set a strong example for upholding the rule of law during times of conflict, and foreign governments have followed this lead**. When states follow the example set by the U.S. Government, the U.S. can benefit greatly. The U.S. Government recognizes that foreign states with strong and independent judicial systems and a commitment to the rule of law make the most stable allies and partners. Stable allies and partners in turn create the best environment for U.S. business investments and commerce and provide the most safety for Americans traveling abroad. Through PILPG’s work with foreign governments, PILPG has observed that U.S. rule of law interests are best represented abroad when foreign governments view the U.S. as committed to the primacy of law. A. Foreign Governments Rely on U.S. Precedent to Promote Rule of Law in Times of Conflict. As noted above, PILPG has advised over two dozen states and governments on the negotiation and implementation of peace agreements and the drafting of post-conflict constitutions. PILPG has also advised all the international war crimes tribunals. PILPG frequently serves as pro bono counsel to foreign governments and judiciaries, advising those governments and judiciaries on important legal issues during times of transition. PILPG’s unique relationship with its clients provides the organization’s members with rare insight into the decision-making process of foreign governments and judiciaries and the influence that the U.S. and this Court have on promoting rule of law during times of conflict. The following examples, from Uganda, Nepal, Somaliland, and South Sudan, illustrate some of the ways in which foreign governments and judiciaries rely on the leadership of the U.S. and this Court to promote rule of law in their home states. i. Uganda In Uganda, the precedent established by this Court in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), and Boumediene v. Bush, 128 S.Ct. 2229 (2008), influenced judges and legislators to incorporate the principles of judicial review and enforceability in their domestic war crimes bill. In 2008 members of PILPG began working with the Government of Uganda to establish a War Crimes Chamber within the Ugandan High Court to prosecute members of the Lord’s Resistance Army (LRA). The LRA is an insurgent group operating in Northern Uganda, which, over the past twenty-five years, has kidnapped over sixty thousand young Ugandan girls and boys, and forced them to be sex slaves and child soldiers. PILPG worked closely with the Ugandan government to establish a judicial mechanism to address this violence in accordance with international legal standards. After discussing with PILPG this Court’s holdings in Hamdan and Boumediene, the Ugandan government decided to include a provision in their bill establishing the War Crimes Chamber that provides for appeal to Uganda’s highest court. Following the example of the U.S., the Ugandans felt that it was important that such high profile and controversial cases involving war crimes and terrorism should be subject to the highest level of judicial review in order to promote independence, fairness, and legitimacy. Provided that this Court issues a robust interpretation of Boumediene, the Ugandan precedent is likely to be repeated by other countries, such as Liberia, which are also contemplating the establishment of judicial bodies to prosecute war crimes and terrorism. ii. Nepal **This Court** has also **served as a model for the nascent Nepal judiciary. Nepal’s 2006 Comprehensive Peace Agreement ended a decade-long civil conflict between Maoist insurgents and government forces. The Agreement provided for the election of a Constituent Assembly to serve as an interim government and to draft a new constitution for Nepal.** Elected in May 2008, the Constituent Assembly is currently in the midst of the constitution drafting process. PILPG is advising the Assembly’s drafting committees on a number of issues, among them the structure, composition, and role of the judiciary. **Members of the Assembly** have **repeatedly expressed the view that the judiciary is a crucial component to fully and effectively implementing the constitution and ensuring the balance of power in the new government.** In technical discussions with members of the Committee on the Judicial System, PILPG discussed several aspects of the U.S. judicial model, including: the U.S. federal and state judicial structures; the types of cases the Supreme Court can adjudicate; the powers and functions of the U.S. judicial branch; the devolution of judicial power in the U.S.; the role of the Supreme Court in establishing precedent for all U.S. courts; and the mechanisms used by the Supreme Court to ensure enforcement of its decisions in the lower courts. **Members of the Committee on the Judicial System were particularly interested in how the U.S. federal court system operates at the national level, and how the U.S. model could be applied in Nepal as Nepal moves towards decentralizing its court system. As the Constituent Assembly moves forward with developing constitutional and judicial structures for Nepal, members will continue to look to the functioning of this Court for guidance on the role of a high court in a federal system, particularly how this Court enforces key decisions in the lower courts**.

**That solves corruption**

**Sanghera 11,** Office of the High Commissioner for Human Rights in Nepal, Nepal Bar Association (NBA) Interaction on Independence of Judiciary for Human Rights, http://nepal.ohchr.org/en/resources/Documents/English/statements/HCR/Year2011/May/2011\_05\_26\_Speech\_NBA\_Interaction\_on\_Independence\_of\_Judiciary\_for\_HR\_E.pdf

• **It is crystal clear that judicial Independence is a matter of human rights. Independent judiciary is a must for rule of law and effective protection of fundamental** human **rights** and freedoms of the people. If we take a look at universal bills of human rights, we can see a number of references to independent judiciary. For instance, Article 8 of UDHR provides, “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” • This has also been incorporated in ICCPR. Article 2(3) of the ICCPR obliges the State to ensure that the right to a remedy is determined by competent judicial, legal or administrative authorities while the Article 14 (1) of the ICCPR guarantees the right to equality before the courts and tribunals and right to a fair and public hearing by a competent, independent and impartial tribunal. In response to Gonzalez del Rio v. Peru (1992) case, the UN Human Rights Committee labeled this right as “an absolute PAGE: 2 right that may suffer no exception”. UN HRC further recognizes that the independence of judiciary consist of a number of things including "actual independence of the Judiciary from the executive branch and the legislative’. • Independence of judiciary has been recognized as an unchallengeable principle globally. This principle received considerable elaboration in the UN Basic Principles on the Independence of the Judiciary (1985), which urges the States to ensure institutional as well as functional independence of judiciary. In this regard, allow me to remind you what these principles mainly require: constitutional guarantee that the judiciary is independent of the other branches of government; non-interference in internal matters of judicial administration; independence in financial matters and a provision of sufficient funds to perform their functions efficiently; the duty of others to respect judicial independence and observe the judicial decisions; jurisdictional exclusivity over all issues of a judicial nature (ban on exceptional or military courts); finality of decisions, meaning that the decisions of the courts are not subject to any revision outside the judiciary; and right and duty of the Judiciary to ensure fair court proceedings and reasoned decisions. • In terms of functional independence, UN Principles on Independence of Judiciary stand for a transparent and representative system of appointments by an independent body based on professional qualifications and personal integrity; security of tenure and adequate remuneration; effective and independent disciplinary mechanisms; right of judges to join professional associations; independence of judges in the performance of professional duties; a right and a duty to decide cases according to law; promotion of judges on basis of objective factors; and removal only for reasons of ‘incapacity or behaviour that renders them unfit to discharge their duties’. • I am pleased to note that Nepal has a strong constitutional tradition of guaranteeing fundamental rights together with an independent judiciary as an immutable safeguard for such rights. Since the **ongoing Constitution-making process offers an historic opportunity to strengthen the foundation for the Nepalese State firmly grounded on respect for human rights and justice, it is crucial** that **the** Constituent **Assembly** further **strengthen the independence of the judiciary at the highest level in order to enable** PAGE: 3 **Nepali people to receive an appropriate remedy determined by competent and independent judicial institutions. In this regard, it is highly important to ensure an independent check and balance through judiciary against legislative and executive excesses encroaching upon fundamental rights and freedoms**. • Experience from around the world tells us that even the most perfectly drafted Constitution does not, in itself, guarantee the enjoyment of human rights. The **rights** recognized in the Constitution **must be given effect by independent bodies**. In this **regard, strong independent judiciary with sufficient power to hold the Government to account, and** national human rights institutions that can **adjudicate complaints of human rights violations are vital for effective accountability mechanisms**.

**It’s accelerating now and will collapse Nepal**

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FOR more than two decades, Nepal, a resource-rich, impoverished country wedged between China and India, has teetered between paralysis and upheaval. Its people have witnessed the transition, in 1990, from an authoritarian Hindu kingdom to a constitutional monarchy; the massacre of members of the royal family in 2001 by the heir to the throne; a decade-long civil war between Maoist insurgents and the government that ended in a faltering peace agreement in 2006; and the removal of the monarchy altogether in 2008.

**Since the civil war ended**, after the loss of more than 16,000 lives, **a stalemate** has **ensued as each party caters to caste, class and ethnic divisions instead of national unity**. Many politicians are maneuvering to get their hands on money from foreign aid, tourism and hydropower; even the Maoists have become crony capitalists, reaping large profits for themselves and their ostensibly proletarian party. Meanwhile, the bureaucracy, army and police — historically dominated by privileged social groups that never held them accountable — are becoming even more politicized and corrupt.

Although **Nepal is no stranger to crises, the one currently seizing the country risks turning it into a failed state**. On May 27, the 601-member legislature, which had been directed to write a new constitution for what is now a democratic republic, missed its deadline for the fourth time since it was created in 2008. Hours before the deadline, after the Supreme Court refused to grant another extension, the Maoist prime minister, Babur/am Bhattarai, dissolved the legislature, known as the Constituent Assembly, and scheduled nationwide elections for Nov. 22. Although averting imminent political disaster and violence, the call for elections is unlikely to bring consensus among the self-interested and fractious political leaders, and is quite likely to produce an even more divided legislature.

The **fitful struggle to develop a constitution both epitomizes and exacerbates the country’s ethnic, religious, geographical, caste and class divisions. More than 90 languages are spoken in this country, about the size of Illinois. Buddhists and Muslims are sizable minorities among the largely Hindu population. Lower-caste people and rural residents have been historically marginalized**; the **grievances run deep**. However, instead of unifying the country, constitution-drafting has become a frenzied contest to secure special privileges for one’s own community.

By making promises they can’t fulfill, **politicians are losing control of the very animosities they’ve whipped up**. Political parties have organized paralyzing protests, with barricades and roadblocks, to demand, or oppose, separate ethnic- and caste-based states within a federal system. The **protests** have **shut down commercial activity across a country that can ill afford such losses: with a per-capita gross domestic product of $490, Nepal is one of the poorest countries in the world; unemployment is at 45 percent.**

The parties are using criminal groups to recruit stick-wielding youths to protest. Induced by a fistful of rupees, a rare treat of a meat meal and an illusion of empowerment, these youth have roughed up drivers and set fire to vehicles that attempt to pass the barriers. Some groups have attacked journalists. Reinforced by former fighters, the Maoist party is among the most effective in demonstrating its street might. Fearing a loss of power, the traditional economic and political elite, the Brahmin and Chhetri castes, who dominate the Nepali Congress Party, have begun to emulate the Maoists’ street tactics.

On Monday, in a move symptomatic of the mistrust and cynicism, dozens of political parties, including the Nepali Congress, raised suspicions about the Maoists’ motives in dissolving the Constituent Assembly and called for protests against its dissolution. Few Nepalis expect the present situation to explode into another civil war, but increasingly brazen and regular acts of violence in the capital demonstrate that lawlessness has reached crisis proportions.

**With most institutions malfunctioning and the system of patronage deeply ingrained, bribery and political connections rule the day. Individual acts of courage against corruption are cause for hope, but to fully restore the rule of law, and respect for it, Nepal needs to step up its efforts to improve public integrity**. A prominent anti-corruption agency has been leaderless for over a year as parties bicker over who should lead it.

**War over Nepal goes nuclear**

**Poudel 2** (Keshab, Looming Uncertainty, The National NewsMagazine, 21(34), 3-8,

http://www.nepalnews.com.np/contents/englishweekly/spotlight/2002/mar/mar08/national2.htm)

Following the September 11 terrorist attacks, however, the United States and western European countries have been expressing solidarity with Nepal. The visit of US Secretary of State Colin Powell and expressions of concern from other western powers over the last three months underscore how the dimensions of violence in Nepal has extended beyond its frontiers. After the government imposed the state of emergency and the Maoist launched deadly assaults in Achham and Salyan districts, **western powers have increased their interest in the kingdom**. The growing concern expressed by Washington and European powers is understandable, as **escalating violence and instability in Nepal could heighten the possibility of external intervention. Such intervention from** either of Nepal's two neighbors — **India and China — may trigger a direct conflict between the two. Even an indirect conflict** between the two Asian powers **could prove** to be **more dangerous than** the confrontation between **India and Pakistan**. Foreign-relations experts say the recent visit of British Foreign Office Minister Ben Bradshaw to Nepal and US Ambassador Michael E. Malinowski trip to Achham and Salyan are clear indicators of Nepal's geo-strategical importance. Another senior US diplomat, A. Peter Burleigh, spoke more candidly about US concerns over the possibility of a prolonged confrontation. "[W]hen situations arise that challenge that positive world order, and which can be addressed by a collective response, it is the responsibility and obligation of all of our countries to come together to restore and preserve the peace," said Ambassador Malinowski in an address to a seminar on South Asian Peace Operations. "Here in Nepal, as we all know, there is no peace. But I do believe that there are lessons for both those of us who live in Nepal and for the international community," he said. Nepal's Position in South Asia Nepal has been ensnared in political instability following the restoration of democracy in 1990. After the Maoist insurgency began in 1996, the kingdom's economic, security and political processes have been thrown into a tangle. According to the Central Bureau of Statistics, Nepal has a length of 885-km (east-west) and a non-uniform mean width of 193-km (north-south). The kingdom shares a frontier of more than 1400 km with China in north and more than 1600 km with India in the east, west and south. The Nepal-India border is open and easy to cross. Although the frontier with China is more or less open, it straddles rugged mountain terrain. It is impossible to build border posts along the border with either country. Therefore, **the geographical position of Nepal has been psychologically threatening** to both neighbors. "**China appears very sensitive towards** activities against her in neighboring countries, including **Nepal**. China's security concern is indicated from [the visits of its] defense minister, senior army officials and home ministry officials from time to time," says Hiranya Lal Shrestha, a foreign relations expert in his article "Nepal-India Relations: Security Issue" published in Policy Study Series by the Institute of Foreign Affairs (November 2000). "At the same time, **we** cannot **overlook** the **weaknesses of a landlocked state.** **Indian security perception regards the Himalayas as its sphere of influence**. Since 14.9 percent of Nepal's territory lies to the north of the Himalayas, we may have to be divided into two spheres of influence if the northern neighbour also puts forward similar logic concerning its security perception. Nepal, in brief, does not want to remain under anyone's sphere of influence," says Shrestha. Be it the British Raj or independent India, Chinese influence in Nepal has always been a matter of concern to leaders of the south neighbor. In the book, "Life of Brian Houghton Hodgson, the British Resident at the Court of Nepal", William Wilson Hunter mentions how the British government was worried about Nepal's relations with China in 18th century. "But my situation by no means so agreeable as it might be if these barbarians did but know their own good. Instead of which they are insolent and hostile and play off on us, as far as they can dare, the Chinese etiquette and foreign polity. The Celestial Emperor is their idol, and, by the way, whilst I write, the  [Nepalese] sovereign himself is passing by the Residency in all royal pomp to go three miles in order to receive a letter which has just reached Nepal from Pekin. There they go! Fifty chiefs on horseback, royalty and royalty's advisors and on eight elephants and three thousand troops before and behind the cavalcade! They have reached the spot. The Emperor's letter, enclosed in a cylinder covered with brocade, hangs round the neck of a chief; who mounted on a spare elephant, is placed at the head of the cavalcade, and the cortege," writes Hodgson in a letter. This reflected how assertive and powerful the Chinese were in the internal dimensions of Nepalese politics in the 18th century. After independence, Indian leaders have been equally concerned about security issues, considering Nepal and Tibet to be the soft underbelly of their own country's security. "This is altogether more inexplicable when one examines the rapidity with which Nehru reacted to events in Nepal in the mid-fifties, forcefully intervening there to restore the Nepalese monarchy. **Nepal** and Tibet were both Himalayan kingdoms, both were **of vital strategic importance to India**, and they were both afflicted, almost simultaneously, whether externally or internally, and yet India and its political leadership reacted differently," writes Indian Foreign Minister Jaswant Singh in his book "Defending India". Referring to India's security, Indian Prime Minister Jawahar Lal **Nehru once observed: "Now our interest in the internal conditions of Nepal became still more acute** and personal, if I may say so, **because of** the developments in China and **Tibet**, to be frank. And regardless, of our feelings about Nepal, we were interested in our country's border. We have had from immemorial time a magnificent frontier, that is to say, the Himalayas are concerned, and they lie on the other side of Nepal. Therefore, the principal barrier to India lies on the other side of Nepal. Therefore, the principal barrier to India lies on the other side of Nepal and we are not going to tolerate any person coming over that barrier. Therefore, much as we appreciate the independence of Nepal, we cannot risk our own security by anything going wrong in Nepal." For his part, Li Peng, the chairman of China's National People's Congress, openly expressed China's security concerns in Nepal during the visit of Sher Bahadur Deuba in 1998 as a former prime minister. **South Asia has three nuclear powers, India, China and Pakistan. Two powers, China and India, are competing for the status of regional power. Any form of direct confrontation between China and India in the south of the Himalayas will have far-reaching consequences.**

**High risk of nuclear war between India and China --- it’s on hair-trigger alert**

**Sullivan and Massa 10**, Mr. Sullivan is research fellow and program manager at the American Enterprise Institute's Center for Defense Studies. Mr. Mazza is a senior research associate at AEI, http://online.wsj.com/news/articles/SB10001424052748703384204575509163717438530

India and Pakistan are the two countries **most likely to engage in nuclear** war, or so goes the common wisdom. Yet **if recent events are any indication, the world's most vigorous nuclear competition may well erupt between** Asia's two giants: **India and China**.

Both countries already house significant and growing arsenals. China is estimated to have approximately 450 warheads; India, roughly 100. Though intensifying as of late, Sino-Indian nuclear competition has a long history: India's pursuit of a weapons program in the 1960s was triggered in part by China's initial nuclear tests, and the two have eyed one another's arsenals with mounting concern ever since. The competition intensified in 2007, when China began to upgrade missile facilities near Tibet, placing targets in northern India within range of its forces.

Yet **the stakes have been raised yet again** in recent months. **Indian defense minister** A.K. Antony **announced** last month that **the military will** soon **incorporate** into its arsenal **a new intermediate-range missile**, the Agni-III, which is **capable of reaching all of China's major cities**. Delhi is also reportedly considering redeploying survivable, medium-range Agni-IIs to its northeastern border. And just last month, India shifted a squadron of Su-30MKI fighters to a base just 150 kilometers from the disputed Sino-Indian border. An Indian Air Force official told Defense News these nuclear-armed planes could operate deep within China with midflight refueling.

For its part, **China continues to enhance the quality, quantity and delivery systems of its nuclear forces**. The Pentagon reported last month that the People's Liberation Army has replaced older, vulnerable ballistic missiles deployed in Western China with modern, survivable ones; this transition has taken place over the last four years. China's Hainan Island naval base houses new, nuclear-powered ballistic-missile submarines and affords those boats easy access to the Indian Ocean. China's military is also developing a new, longer range submarine-launched ballistic missile which will allow its subs to strike targets throughout India from the secure confines of the South China Sea.

**No circumvention and the courts are effective—the executive will consent**

**Prakash and Ramsay 12, Professors of Law**

 [2012, Saikrishna B. Prakash is a David Lurton Massee, Jr. Professor of Law and Sullivan and Cromwell Professor of Law, University of Virginia School of Law., and Michael D. Ramsey is a Professor of Law, University of San Diego School of Law; “The Goldilocks Executive”, Review of THE EXECUTIVE UNBOUND:AFTER THE MADISONIAN REPUBLIC. By Eric A. Posner & Adrian Vermeule, 90 Texas L. Rev. 973, <http://www.texaslrev.com/wp-content/uploads/Prakash-Ramsey-90-TLR-973.pdf>]

The Courts.—**The courts constrain the Executive**, **both because courts are necessary to the Executive imposing punishments and because courts can enforce the Constitution and laws against the Executive**. It is true, as Posner and Vermeule say, that **courts often operate ex post and that they may defer to executive determinations**, especially in sensitive areas such as national security. But **these qualifications do not render the courts meaningless** as a Madisonian constraint. First, **to impose punishment, the Executive must bring a criminal case before a court. If the court**, either via jury or by judge, **finds for the defendant, the Executive does not suppose that it can nonetheless impose punishment** (or even, except in the most extraordinary cases, continue detention). **This is so even if the Executive is certain that the court is mistaken and that failure to punish will lead to bad results**. As a result, **the Executive’s ability to impose its policies upon unwilling actors is** sharply **limited by the need to secure the cooperation of a constitutionally independent branch, one that many suppose has a built-in dedication to the rule of law.**84 And **one can hardly say**, in the ordinary course, **that trials and convictions in court are a mere rubber stamp** of Executive Branch conclusions. Second, **courts issue injunctions that bar executive action.** Although it is not clear whether the President can be enjoined,85 **the rest of his branch surely can and thus can be forced to cease actions that judges conclude violate federal law or the Constitution**.86 As a practical matter, **while courts issue such injunctions infrequently, injunctions would be issued more often if an administration repeatedly ignored the law**. Third, **courts’ judgments sometimes force the Executive to take action**, such as adhering to a court’s reading of a statute in areas related to benefits, administrative process, and even commission delivery. Though the claim in Marbury v. Madison87 that courts could issue writs of mandamus to executive officers was dicta,88 it was subsequently confirmed in Kendall v. United States ex rel. Stokes, 89 a case where a court ordered one executive officer to pay another.90 Finally, **there is the extraordinary practice of the Executive enforcing essentially all judgments**. The occasions in which the Executive has refused to enforce judgments are so few and far between that they are the stuff of legend. To this day, we do not know whether Andrew Jackson said, “John Marshall has made his decision, now let him enforce it.”91 Lincoln’s disobedience of Chief Justice Taney’s writ of habeas corpus is so familiar because it was so singular. Yet **to focus on actual court cases and judgments is to miss the broader influence of the courts. Judicial review of executive action matters because the knowledge of such review affects what the Executive will do.** **Executives typically do not wish to be sued, meaning that they often will take measures designed to stave off such suits and avoid actions that raise the risk of litigation. The ever-present threat that someone will take a case to court and defeat the Executive acts as a powerful check on executive decision making.** **The Executive must take account of law, including law defined as what a court will likely order.**

 **No checks on escalation in Middle East war**

**Singh 11**, Washington Institute director, 9/22, “What has really changed in the Middle East?”, http://shadow.foreignpolicy.com/posts/2011/09/22/what\_has\_really\_changed\_in\_the\_middle\_east

Third, and **most troubling, the Middle East is likely to be a more dangerous and volatile region in the future. For the past several decades, a relatively stable regional order has prevailed**, centered around Arab-Israeli peace treaties and close ties between the United States and the major Arab states and Turkey. **The region was not conflict-free by any means**, and Iran, Iraq, and various transnational groups sought to challenge the status quo, albeit largely unsuccessfully. **Now, however, the United States appears less able or willing to exercise influence in the region, and the leaders and regimes who guarded over the regional order are gone**

**or under pressure. Sensing either the need or opportunity to act autonomously, states like Turkey, Saudi Arabia, and Iran are increasingly bold, and all are well-armed and aspire to regional leadership. Egypt**, once stabilized, **may join this group. While interstate conflict is not inevitable by any means, the risk of it has increased and the potential brakes on it have deteriorated**. Looming over all of this is Iran's quest for a nuclear weapon, which would shift any contest for regional primacy into overdrive.

#### Democratic transitions are coming now but will fail absent Supreme Court leadership

**Suto 11, Research Associate at Tahrir Institute and J.D.**

[07/15/11, Ryan Suto is a Research Associate at Tahrir Institute for Middle East Policy, has degrees in degrees in law, post-conflict reconstruction, international relations and public relations from Syracuse Law, “Judicial Diplomacy: The International Impact of the Supreme Court”, http://jurist.org/dateline/2011/07/ryan-suto-judicial-diplomacy.php]

**The Court is certainly the best institution to explain to scholars, governments, lawyers and lay people alike the enduring legal values of the US, why they have been chosen and how they contribute to the development of a stable and democratic society**. **A return to the mentality that one of America's most important exports is its legal traditions would certainly benefit the US and stands to benefit nations building and developing their own legal traditions**, and our relations with them. Furthermore, **it stands to increase the influence and higher the profile of the bench**. The Court already engages in the exercise of dispensing justice and interpreting the Constitution, and to deliver its opinions with an eye toward their diplomatic value would take only minimal effort and has the potential for high returns. **While the Court is indeed the best body to conduct legal diplomacy, it has been falling short in doing so in recent sessions**. **We are at a critical moment in world history**. **People in the Middle East and North Africa are asserting discontent with their governments**. **Many nations in Africa, Asia, and Eurasia are grappling with new technologies, repressive regimes and economic despair.** With **the development of new countries, such as South Sudan, the formation of new governments, as is occurring in Egypt, and the development of new constitutions, as is occurring in Nepal, it is important that the US welcome and engage in legal diplomacy and informative two-way dialogue**. As a nation with lasting and sustainable legal values and traditions, **the Supreme Court should be at the forefront of public legal diplomacy. With each decision, the Supreme Court has the opportunity to better define, explain and defend key legal concepts. This is an opportunity that should not be wasted.**

**Promoting a strong judiciary is necessary to make those transitions stable and democratic—detention policies guarantee global authoritarianism**

**CJA 4**, Center for Justice and Accountability

[OCTOBER 2004, The Center for Justice & Accountability (“CJA”) seeks, by use of the legal systems, to deter torture and other human rights abuses around the world., “BRIEF OF the CENTER FOR JUSTICE AND ACCOUNTABILITY, the INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, and INDIVIDUAL ADVOCATES for the INDEPENDENCE of the JUDICIARY in EMERGING DEMOCRACIES as AMICI CURIAE IN SUPPORT OF PETITIONERS”, http://www.cja.org/downloads/Al-Odah\_Odah\_v\_US\_\_\_Rasul\_v\_Bush\_CJA\_Amicus\_SCOTUS.pdf]

A STRONG, INDEPENDENT JUDICIARY IS ESSENTIAL TO THE PROTECTION OF INDIVIDUAL FREEDOMS AND THE ESTABLISHMENT OF STABLE GOVERNANCE IN EMERGING DEMOCRACIES AROUND THE WORLD. A. Individual Nations Have Accepted and Are Seeking to Implement Judicial Review By A Strong, Independent Judiciary. **Many of the newly independent governments that have proliferated over the past five decades have adopted these ideals**. **They have emerged from a variety of less-than-free contexts, including the end of European colonial rule in the 1950's and 1960's, the end of the Cold War and the breakup of the former Soviet Union** in the late 1980's and 1990's, t**he disintegration of Yugoslavia, and the continuing turmoil in parts of Africa, Latin America and southern Asia.** **Some countries have successfully transitioned to stable and democratic forms of government** that protect individual freedoms and human rights **by means of judicial review by a strong and independent judiciary.** **Others have suffered the rise of tyrannical and oppressive rulers who consolidated their hold on power in part by diminishing or abolishing the role of the judiciary.** And still **others hang in the balance, struggling against the onslaught of tyrants to establish stable, democratic governments.** In their attempts to shed their tyrannical pasts and to ensure the protection of individual rights, **emerging democracies have consistently looked to the U**nited **S**tates **and its Constitution in fashioning frameworks that safeguard the independence of their judiciaries.** See Ran Hirschl, The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions, 25 Law & Soc. Inquiry 91, 92 (2000) (stating that of the “[m]any countries . . . [that] have engaged in fundamental constitutional reform over the past three decades,” nearly all adopted “a bill of rights and establishe[d] some form of active judicial review”) **Establishing judicial review by a strong and independent judiciary is a critical step in stabilizing and protecting these new democracies.** See Christopher M. Larkins, Judicial Independence and Democratization: A Theoretical and Conceptual Analysis, 44 Am. J. Comp. L. 605, 605-06 (1996) (describing the judicial branch as having "a uniquely important role" in transitional countries, not only to "mediate conflicts between political actors but also [to] prevent the arbitrary exercise of government power; see also Daniel C. Prefontaine and Joanne Lee, The Rule of Law and the Independence of the Judiciary, International Centre for Criminal Law Reform and Criminal Justice Policy (1998) ("There is increasing acknowledgment that an independent judiciary is the key to upholding the rule of law in a free society . . . . Most countries in transition from dictatorships and/or statist economies recognize the need to create a more stable system of governance, based on the rule of law."), available at http://www.icclr.law.ubc.ca/Publications/Reports/RuleofLaw. pdf (last visited Jan. 8, 2004). Although the precise form of government differs among countries, “**they ultimately constitute variations within, not from, the American model of constitutionalism** . . . **[a] specific set of fundamental rights and liberties has the status of supreme law, is entrenched against amendment or repeal . . . and is enforced by an independent court** . . . .” Stephen Gardbaum, The New Commonwealth Model of Constitutionalism, 49 Am. J. Comp. L. 707, 718 (2001). **This phenomenon became most notable worldwide after World War II when certain countries**, such as Germany, Italy, and Japan, **embraced independent judiciaries f**ollowing their bitter experiences under totalitarian regimes. See id. at 714- 15; see also United States v. Then, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) (“Since World War II, **many countries have adopted forms of judicial review, which** — though different from ours in many particulars — **unmistakably draw their origin and inspiration from American constitutional theory and practice.** See generally Mauro Cappelletti, The Judicial Process in Comparative Perspective (Oxford: Clarendon Press, 1989).”). **It is a trend that continues to this day. It bears mention that the United States has consistently affirmed and encouraged the establishment of independent judiciaries in emerging democracies**. In September 2000, President Clinton observed that "[w]ithout the rule of law, elections simply offer a choice of dictators. . . . **America's experience should be put to use to advance the rule of law, where democracy's roots are looking for room and strength to grow**." Remarks at Georgetown University Law School, 36 Weekly Comp. Pres. Doc. 2218 (September 26, 2000), available at http://clinton6.nara.gov/2000/09/2000-09-26- remarks-by-president-at-georgetown-international-lawcenter.html. **The U**nited **S**tates **acts on these principles in part through the assistance it provides to developing nations.** For example, the United States requires that any country seeking assistance through the Millenium Challenge Account, a development assistance program instituted in 2002, must demonstrate, among other criteria, an "adherence to the rule of law." The White House noted that the rule of law is one of the "essential conditions for successful development" of these countries. See http://www.whitehouse.gov/infocus/developingnations (last visited Jan. 8, 2004).12 **A few examples illustrate the influence of the United States model**. **On November 28, 1998, Albania adopted a new constitution,** representing the culmination of eight years of democratic reform after the communist rule collapsed. **In addition to protecting fundamental individual rights, the Albanian Constitution provides for an independent judiciary** consisting of a Constitutional Court with final authority to determine the constitutional rights of individuals. Albanian Constitution, Article 125, Item 1 and Article 128; see also Darian Pavli, "A Brief 'Constitutional History' of Albania" available at http://www.ipls.org/services/others/chist.html (last visited Janaury 8, 2004); Jean-Marie Henckaerts & Stefaan Van der Jeught, Human Rights Protection Under the New Constitutions of Central Europe, 20 Loy. L.A. Int’l & Comp. L.J. 475 (Mar. 1998). In South Africa, **the new constitutional judiciary plays a similarly important role, following generations of an oppressive apartheid regime**. South Africa adopted a new constitution in 1996. Constitution of the Republic of South Africa, Explanatory Memorandum. It establishes a Constitutional Court which “makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional.” Id. at Chapter 8, Section 167, Item (5), available at http://www.polity.org.za/html/govdocs/constitution/saconst.html?r ebookmark=1 (last visited January 8, 2004); see also Justice Tholakele H. Madala, Rule Under Apartheid and the Fledgling Democracy in Post-Apartheid South Africa: The Role of the Judiciary, 26 N.C. J. Int’l L. & Com. Reg. 743 (Summer 2001). **Afghanistan is perhaps the most recent example of a country struggling to develop a more democratic form of government**. **Adoption by the Loya Jirga of Afghanistan's new constitution on January 4, 2004 has been hailed as a milestone**. See http://www.cbsnews.com/stories/2004/01/02/world/main59111 6.shtml (Jan 7, 2004). The proposed constitution creates a judiciary that, at least on paper, is "an independent organ of the state," with a Supreme Court empowered to review the constitutionality of laws at the request of the Government and/or the Courts. Afghan Const. Art. 116, 121 (unofficial English translation), available at http://www.hazara.net/jirga/AfghanConstitution-Final.pdf (last visited January 8, 2004). See also Ron Synowitz, Afghanistan: Constitutional Commission Chairman Presents Karzai with Long-Delayed Draft Constitution (November 3, 2003), available at http://www.rferl.org/nca/features/2003/11/03112003164239.as p (last visited Jan. 8, 2004). B. **Other Nations Have Curtailed Judicial Review During Times Of Crisis, Often Citing the United States' Example, And Individual Freedoms Have Diminished As A Result.** **While much of the world is moving to adopt the institutions necessary to secure individual rights, many still regularly abuse these rights.** **One of the hallmarks of tyranny is the lack of a strong and independent judiciary**. Not surprisingly, **where countries make the sad transition to tyranny, one of the first victims is the judiciary.** **Many of the rulers that go down that road justify their actions on the basis of national security and the fight against terrorism**, and, disturbingly, many **claim to be modeling their actions on the United States**. Again, a few examples illustrate this trend. In **Peru**, one of former President Alberto **Fujimori’s first acts in seizing control was to assume direct executive control of the judiciary, claiming that it was justified by the threat of domestic terrorism. He then imprisoned thousands, refusing the right of the judiciary to intervene.** International Commission of Jurists, Attacks on Justice 2000-Peru, August 13, 2001, available at http://www.icj.org/news.php3?id\_article=2587&lang=en (last visited Jan. 8, 2004). In Zimbabwe, President **Mugabe’s rise to dictatorship has been punctuated by threats of violence to and the co-opting of the judiciary. He now enjoys virtually total control over Zimbabweans' individual rights and the entire political system**. R.W. Johnson, Mugabe’s Agents in Plot to Kill Opposition Chief, Sunday Times (London), June 10, 2001; International Commission of Jurists, Attacks on Justice 2002— Zimbabwe, August 27, 2002, available at http://www.icj.org/news.php3?id\_article=2695&lang=en (last visited Jan. 8, 2004). While Peru and Zimbabwe represent an extreme, **the independence of the judiciary is under assault in less brazen ways in a variety of countries today**. A highly troubling aspect of this trend is the fact that in **many of these instances those perpetuating the assaults on the judiciary have pointed to the United States’ model to justify their actions**. Indeed, **many have specifically referenced the United States’ actions in detaining persons in Guantánamo Bay.** For example, Rais Yatim, **Malaysia's "de facto law minister" explicitly relied on the detentions at Guantánamo to justify Malaysia's detention of more than 70 suspected Islamic militants for over two years.** Rais stated that **Malyasia's detentions were "just like the process in Guantánamo,"** adding, "I put the equation with Guantánamo just to make it graphic to you that this is not simply a Malaysian style of doing things." Sean Yoong, "Malaysia Slams Criticism of Security Law Allowing Detention Without Trial," Associated Press, September 9, 2003 (available from Westlaw at 9/9/03 APWIRES 09:34:00). Similarly, **when responding to a United States Government human rights report that listed rights violations in Namibia**, **Namibia's Information Permanent Secretary Mocks Shivute cited the Guantánamo Bay detentions, claiming that "the US government was the worst human rights violator in the world."** BBC Monitoring, March 8, 2002, available at 2002 WL 15938703. Nor is this disturbing trend limited to these specific examples. At a recent conference held at the Carter Center in Atlanta, President **Carter, specifically citing the Guantánamo Bay detentions, noted that the erosion of civil liberties in the United States has "given a blank check to nations who are inclined to violate human rights already.**" Doug Gross, "Carter: U.S. human rights missteps embolden foreign dictators," Associated Press Newswires, November 12, 2003 (available from Westlaw at 11/12/03 APWIRES 00:30:26). At the same conference, Professor Saad Ibrahim of the American University in Cairo (who was jailed for seven years after exposing fraud in the Egyptian election process) said, "Every dictator in the world is using what the United States has done under the Patriot Act . . . to justify their past violations of human rights and to declare a license to continue to violate human rights." Id. Likewise, Shehu Sani, **president of the Kaduna, Nigeriabased Civil Rights Congress, wrote in the International Herald Tribune** on September 15, 2003 **that "[t]he insistence by the Bush administration on keeping Taliban and Al Quaeda captives in indefinite detention in Guantánamo Bay**, Cuba, **instead of in jails in the United States — and the White House's preference for military tribunals over regular courts — helps create a free license for tyranny in Africa.** **It helps justify Egypt's move to detain human rights campaigners as threats to national security, and does the same for similar measures by the governments of Ivory Coast, Cameroon and Burkina Faso."** Available at http://www.iht.com/ihtsearch.php?id=109927&owner=(IHT)&dat e=20030121123259. **In our uni-polar world, the United States obviously sets an important example on these issues.** As reflected in the foundational documents of the United Nations and many other such agreements, **the international community has consistently affirmed the value of an independent judiciary to the defense of universally recognized human rights**. In the crucible of actual practice within nations, **many have looked to the United States model when developing independent judiciaries with the ability to check executive power in the defense of individual rights**. **Yet others have justified abuses by reference to the conduct of the United States**. **Far more influential than the words of Montesquieu and Madison are the actions of the** **U**nited **S**tates. **This case starkly presents the question of which model this Court will set for the world.** CONCLUSION **Much of the world models itself after this country’s two hundred year old traditions** — and still more on its day to day implementation and expression of those traditions. **To say that a refusal to exercise jurisdiction** in this case **will have global implications is not mere rhetoric**. **Resting on this Court’s decision is not only the necessary role this Court has historically played in this country. Also at stake are the freedoms that many in emerging democracies** around the globe seek to ensure for their peoples.